

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
MISCELLANEOUS LAND APPLICATION NO. 433 OF 2016  
(Arising from Land Case No. 237 of 2004)**

**GODFREY MALASSY ..... FIRST APPLICANT  
CITY CHRISTIAN FELLOWSHIP ..... SECOND APPLICANT**

**VERSUS**

**PROSPER RWEYENDERA ..... RESPONDENT**

**R U L I N G**

24 & 27.06.2016

**NDIKA, J:**

By chamber summons made under the provisions of Order XXI, rule 21 (2) of the Civil Procedure Code, Cap. 33 RE 2002, Mr. Godfrey Malassy and City Christian Fellowship ("the First and Second Applicants" respectively) apply against Mr. Prosper Rweyendera ("the Respondent") for the following orders:

"1. That this Honourable Court be pleased to grant an order for maintaining the status quo by staying execution of the 14 days notice issued by RHINO AUCTION MART AND COURT BROKER to the applicants on 25<sup>th</sup> May, 2016 pending the hearing and determination of the applicants' application for stay of execution by the Court of Appeal of Tanzania.

2. The costs of this application be provided for."

The application is taken out by Rights Action (Advocates) formerly known as M.K. Rwebangira & Co. Advocates and is supported by the affidavits of Mrs. Magdalena Rwebangira and the First Applicant. Mrs. Rwebangira, learned Advocate, represented the Applicants before this Court in respect of the main suit (i.e., Land Case No. 237 of 2004) from which this application has arisen. In opposition to the application, the Respondent lodged two replying affidavits, to which Mrs. Rwebangira and the First Applicant filed their respective rejoinders.

*see pages 5 and 6*

By notice of preliminary objection lodged on 13<sup>th</sup> June 2016 by Rutabingwa & Co. Advocates, the Respondent challenges the legal sufficiency of this application on three grounds as follows:

1. That the application lodged by the Applicants on 6<sup>th</sup> June 2016 is overtaken by events as execution has already taken place.
2. That the Court is not properly moved.
3. That the Court has no jurisdiction to entertain the matter following the Applicants' filing of notice of appeal and an application for stay of execution at the Court of Appeal of Tanzania.

I find it necessary to preface this ruling with what I consider to be abridged facts of this dispute as can be gleaned from the verifying affidavits lodged by or for the Applicants. I do so as I am alive to the rule that in determining an objection against the legal sufficiency of an action, the material facts pleaded by the party against whom the objection has been raised must be assumed to be true. [See: *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 at page 701 that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. See also *Dharsi Manji and Sons v Amiri Said* [1972] HCD 234 and *John M. Byombalirwa v Agency Maritime Internationale (Tanzania) Limited* [1983] TLR 1)].

The Applicants herein lost an action (i.e., Land Case No. 237 of 2004) mounted against them by the Respondent for various reliefs including a declaration that their adversary was the lawful owner of landed property described as Plot No. 932, Block 'C', Sinza, Kinondoni, Dar Es Salaam held under Certificate of Title No. 32759. In its judgment delivered on 28<sup>th</sup> April 2016, this Court (Mgetta, J.) granted the declaration as prayed and ordered the Applicants to vacate the suit property forthwith. In addition, the Court awarded costs of the suit as well as mesne profits to the Respondent (for the period between November 2004 until when the suit property is handed over to him at the monthly rate of TZS. 1,000,000.00) and then ordered the Applicants to clear outstanding bills for utilities consumed at the suit property during the material period.

Discontented by this Court's judgment and decree, the Applicants lodged a notice of intention to appeal to the Court of Appeal of Tanzania along with an application for leave to appeal on 3<sup>rd</sup> May 2016. As the Applicants' advocate, Mrs. Magdalena

Rwebangira, was processing the intended appeal as well as lodging with the Court of Appeal of Tanzania an application for stay of execution of the decree in favour of the Respondent, the Applicants were served with notice to show cause why the decree should not be executed against them. There is no doubt that the said notice was issued under the provisions of Order XXI, rule 20 (1) of Cap. 33 (*supra*) and that it signified to the Applicants that the Respondent had already commenced the execution of the decree in his favour.

According to Paragraphs 5, 6, 7, 8, 9 and 10 of Mrs. Rwebangira's affidavit, it is averred, in effect, that the Applicants resisted the execution by lodging a preliminary objection to the application for execution accompanied with an affidavit in objection; that the District Registrar was urged through the Applicants' submissions not to proceed with the execution on the strength of the holding by the Court of Appeal of Tanzania in *Ahmed Mbaraka v Mwananchi Engineering Contracting Company Limited*, Civil Application No. 229 of 2014, that the High Court should refrain from executing a decree when there is a pending appeal from the Court's decision; that the Deputy Registrar overruled the objection and proceeded with the execution; that on 25<sup>th</sup> May 2016 Rhino Auction Mart and Court Broker issued a fourteen days notice to the Applicants to vacate the suit property; and that an eviction order of this Court was affixed at the suit property notifying that the Applicants would be ejected from the suit property on 9<sup>th</sup> June 2016.

In his submissions on the preliminary objection, Mr. Joseph Rutabingwa, learned Counsel for the Respondent, argued, at first, the third point of objection that the Court has no jurisdiction to entertain this application following the Applicants' filing of notice of intention to appeal to the Court of Appeal of Tanzania and lodging an application for stay of execution by notice of motion filed on 30<sup>th</sup> May 2016. He argued that the law was clear that once a party files a notice of appeal to initiate an appeal to the Court of Appeal of Tanzania, the High Court ceases to have jurisdiction except in respect of matters for leave to appeal or issuance of certificate that a point of law is involved in the intended appeal. While stating that there were numerous decisions of the Court of Appeal of Tanzania on that position, he cited the said Court's decision in *Ravindra R. Desai & Anor v Cooperative and Rural Development Bank*, Civil References Nos. 2 and 3 of 1996 (unreported). At page 3 of the typed ruling, the Court, speaking through Nyalali, C.J., held that:

“Before coming to the merits of the two References, we must point out that the proceedings before Mwipopo, J. for execution are undoubtedly a nullity since, on the basis of numerous decisions of the High Court and this Court, the High Court has no jurisdiction to entertain proceedings for stay of execution after notice of appeal to this Court has been given.”

In her reply for the Applicants, Mrs. Rwebangira conceded to the position stated by Mr. Rutabingwa. However, she expressed her concern that this Court clothed itself with jurisdiction it did not have and went ahead with the execution against the Applicants. In her opinion, the present application should be viewed as being proper within its peculiar circumstances.

It is beyond peradventure that Mr. Rutabingwa’s argument, based upon the decision of the Court of Appeal of Tanzania that he cited, is unassailable. I am fortified that Mrs. Rwebangira concedes that this Court has no jurisdiction to take cognizance and determine an application for stay of execution once a notice of appeal is lodged, it being an initial but essential step towards appealing to the Court of Appeal of Tanzania.

I should add that, as a matter of fact, the earliest decision of the Court of Appeal of Tanzania on the above position is *Aero Helicopter (T) Ltd v F.N. Jansen* [1990] 142. After an elaborate analysis of sections 2 and 95 of Cap. 33 (*supra*) along with those of the Appellate Jurisdiction Act, 1979 and the Court of Appeal Rules, 1979, the Court (Kisanga, J.A.) concluded, at page 148, that:

“[O]nce appeal proceedings to this Court 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.”

Other decisions of that Court affirming that position include *Jaffari Sanya Juma & Another v Saleh Sadiq Osman*, Civil Appeal No. 54 of 1997, CAT at Zanzibar (unreported); *TANESCO v Dowans Holdings and Another*, Civil Appeal No. 142 of 2012, CAT at Dar Es Salaam (unreported); and *Aminiel Mtui & 3 Others v Stanley Ephata Kimambo*, Civil Application No. 19 of 2014, CAT at Arusha (unreported).

With respect, I do not share the concern raised by Mrs. Rwebangira that by overruling the Applicants’ protest and then proceeding with the execution of the decree, this Court (that is, the Deputy Registrar) usurped the powers it did not have. Unless the Court of Appeal of Tanzania had stayed the execution process following the lodgment of the notice of appeal, this Court, as executing court, had powers under the provisions of

Order XXI of Cap. 33 (*supra*) to execute the decree against the Applicants. Even if it were assumed *arguendo* that Mrs. Rwebangira's contention that this Court had, indeed, usurped execution powers it did not have, I seriously doubt that the course taken by the Applicants to lodge this matter would be proper. The proper forum for challenging the alleged usurpation of powers, by way of appeal or revision, is obviously not this Court but the Court of Appeal of Tanzania.

On the above analysis, I sustain the third point of preliminary objection that this Court has no jurisdiction to deal with this matter as the Applicants have already lodged notice of intention to appeal to the Court of Appeal of Tanzania. Accordingly, this matter is incompetent and must be struck out.

Although my determination on the third point of preliminary objection is sufficient to dispose of this matter, I find it necessary to consider and determine, albeit briefly, the other two points of preliminary objection.

I now move on to deal with the first point of preliminary objection that the application is overtaken by events as the execution sought to be stayed has been carried out.

On the above point, Mr. Rutabingwa submitted that based on the counter affidavit deposed by the First Applicant, the execution of the decree in favour of the Respondent sought by the Applicants to be stayed, was carried out on 9<sup>th</sup> June 2016 by evicting the Applicants from the suit property, which was, then, handed over to the Respondent. To buttress his point, he cited the Court of Appeal of Tanzania's decision in *Andrew Jacob v NBC Holding Corporation*, CAT at Mwanza, Civil Application No. 1 of 2000 (unreported). In that case, the Court dismissed an application for stay of execution because the applicant had already been evicted from the suit property. At page 3 of the typed ruling, the Court held as follows:

"Upon close consideration of these submissions by counsel for both parties and the material laid before me, I am clearly of the view that there is no merit in this application. First, as agreed by counsel, execution has already taken place. The applicant has been evicted from the suit premises, the subject of the suit at the trial. It is common knowledge that the purpose of granting stay of execution is to restrain the winning party in a suit from carrying into effect the decision of the court before the determination of the appeal pending. If, as was the case here, the court's decision has been effected, the order of stay, would, as Mr. Kahangwa conceded, serve no practical purpose."

Mr. Rutabingwa also cited the Court of Appeal of Tanzania's decision in *Hhawu Baran v Tluway Qwaray*, Civil Application No. 13 of 1998 (unreported). In that matter, the Court held that when a decree has been fully satisfied, there would be nothing to stay.

In reply, Mrs. Rwebangira conceded that her clients were evicted as alleged but denied that execution process had been completed. She claimed that the execution was still ongoing as certain belongings of the Applicants had not yet been removed from the suit property. In this respect, she cited the rejoinder by the First Applicant to the Respondent's replying affidavit, averring that while some assets of the Applicants were piled up outside the gate to the suit compound, a few assets including a container and office records remained within the suit premises.

In his rejoining submissions, Mr. Rutabingwa maintained that the execution process had been completed and that all the belongings of the Applicants had been removed from the suit compound and placed outside the gate.

Having heard the parties on this matter, I am in agreement with Mr. Rutabingwa that the eviction order, sought to be stayed pending "hearing and determination of an application for stay of execution before the Court of Appeal of Tanzania", has been fully satisfied. I so hold because if, as admitted by Mrs. Rwebangira, most of the Applicants' belongings have been removed from the suit property and then the Court Broker handed over the suit property to the Respondent, it seems that the Respondent has taken effective occupation and control of the suit premises. While I would agree that there might be a few assets of the Applicants lying within the suit property, that fact alone does not imply that the eviction order is yet to be wholly satisfied. As long as the Applicants no longer have effective possession and control of the suit property, they must be deemed to have been ejected from that property. In these circumstances, the order for staying the eviction of the Applicants would serve no practical purpose. For it cannot restrain the Respondent from taking possession and control of the suit property. Accordingly, I find merit in the first ground of preliminary objection: there is nothing to stay in this matter.

As regards the final point (i.e., the second point of preliminary objection), Mr. Rutabingwa contended that the enabling provisions cited for the present application do not empower the Court to stay execution of decree pending hearing and determination of an application before the Court of Appeal of Tanzania. It was his view that the cited

provisions only applied to objections to execution of decrees. Recalling that the Applicants' earlier objection to the execution of the decree had been considered and dismissed by the Deputy Registrar of this Court, Counsel maintained that the Applicants could not file a fresh objection.

In her reply, Mrs. Rwebangira expressed her misgivings that despite lodging objection proceedings against the execution of the decree, the Deputy Registrar went ahead with the execution processes. She strongly attacked the said Deputy Registrar's course of action on the reason that he executed the decree even though it was brought to his notice that in *Ahmed Mbaraka v Mwananchi Engineering Contracting Company Limited (supra)* the said Court enjoined the High Court from executing a decree when there is a pending appeal from the High Court's decision. The relevant passage from that decision that the Deputy Registrar was invited to comply with is at page 7 of the typed ruling. It reads as follows:

**"[T]he officer signing the order authorizing the execution to be carried out must comply with the provisions of the law. He/she must ensure that before signing the documents authorizing execution to be carried out, there is either no appeal pending, or none of the parties has initiated the appeal process, or where the process was initiated, there is negligence by the party in making a follow up."** [Bolding added for emphasis]

Mr. Rutabingwa rejoined that the holding cited by Mrs. Rwebangira in *Ahmed Mbaraka v Mwananchi Engineering Contracting Company Limited (supra)* was an *obiter dictum*, implying that it was not binding upon this Court.

In order to deal with the second point of preliminary objection, I think it is imperative that I reproduce the enabling provisions cited for this application, that is, Order XXI, rule 21 (2) of Cap. 33 (*supra*):

**"(2) Where such person offers any objection to the execution of the decree, the court shall consider such objection and make such order as it thinks fit."**

It is my considered view that the above provisions empower a court executing a decree, to hear and determine any objection to the execution of the decree concerned. The objecting person would file such an objection after he had been served with the notice under Order XXI, rule 20 (1) of Cap. 33 (*supra*) to show cause against execution intended to be carried out. By its nature, an objection to execution is a claim against executability of a decree in the manner applied for by the decree-holder. It is ordinarily raised on the

ground that the property subject to execution is not liable for execution. Conversely, a stay of execution is a relief aimed at suspending or postponing execution especially pending adjudication of an appeal or revision. By its nature and operation, a plea for staying execution does not attack executability of the decree involved in the manner proposed by the decree-holder.

Based on the above analysis, I am compelled to agree with Mr. Rutabingwa that the enabling provisions cited clearly do not vest in this Court the power to grant stay of execution of decrees. Those provisions apply to adjudication of objections to execution of decrees. It is evident that the Applicants' solicitation, as shown on the chamber summons, for granting an "order for maintaining the status quo by staying execution of the 14 days notice ... pending the hearing and determination of the applicants' application for stay of execution by the Court of Appeal of Tanzania" is not an objection contemplated by Order XXI, rule 20 (1) of Cap. 33 (*supra*). It does not contest the executability of the decree in favour of the Respondent but seeks the execution applied for to be suspended. For that reason, I would agree with Mr. Rutabingwa that this Court was not properly moved to grant the relief the Applicants are praying for.

Before concluding, I should, perhaps, make an observation on Mrs. Rwebangira's misgivings on the course taken by the Deputy Registrar of this Court in handling the execution process. It was her view that the Deputy Registrar should have desisted from executing the decree in light of the holding by the Court of Appeal of Tanzania in *Ahmed Mbaraka v Mwananchi Engineering Contracting Company Limited* (*supra*) that supposedly enjoined this Court from executing a decree when there is a pending appeal before the Court of Appeal of Tanzania. Having read *Ahmed Mbaraka v Mwananchi Engineering Contracting Company Limited* (*supra*), along with the provisions of Rule 11 (2) (b) of the Tanzania Court of Appeal Rules, 2009 that lodgment of a notice of appeal with the Court of Appeal of Tanzania shall not in and of itself operate as stay of execution, I am disinclined to hold that the Court of Appeal of Tanzania, speaking through Kimaro, J.A., in *Ahmed Mbaraka v Mwananchi Engineering Contracting Company Limited* (*supra*) enjoined this Court from executing a decree whenever there is a pending appeal before the Court of Appeal of Tanzania. This view is predicated upon two grounds: first, as rightly submitted by Mr. Rutabingwa, the remark by Kimaro, J.A., was no more than *obiter dictum*, hence not binding upon this Court. It was an incidental expression of opinion, not essential to the decision of that Court and not establishing



precedent on that aspect. Secondly, the said chance remark appears to have been made within the context of the Court's opinion that there was need to recommend for rationalization and realignment of the aforesaid Rule 11 (2) (b) in light of the provisions of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania (on expeditiousness in disposal of litigation) to ensure that the original record of this Court is not called for by the Court of Appeal of Tanzania for hearing and disposal of applications for stay of execution. The Court of Appeal of Tanzania was concerned in that case that calling for the original records of this Court whenever it had to hear and determine applications for stay of execution of decrees practically resulted in untold and inordinate delays in resolution of civil disputes. For such applications could be heard and disposed of without the need for reference to the original records.

On the basis of the foregoing, I remain unconvinced that the course of action taken by the Deputy Registrar, in the absence of an appropriate order made by the Court of Appeal of Tanzania for staying the execution of the decree, can be faulted. However, I wish to put a rider that I am also mindful of the need for the Deputy Registrar, whenever executing any decree of this Court, to apply his judgment diligently and farsightedly in a manner that does not allow the preemption of a judgment-debtor's application for stay of execution before the Court of Appeal of Tanzania, if at all there is one already filed.

In the end, I sustain the preliminary objection on all the three points raised. Accordingly, I order that this matter be and is hereby struck out with costs for its incompetence.

**G.A.M. NDIKA**  
**JUDGE**  
**27<sup>TH</sup> JUNE 2016**

Court: Delivered in the presence of Ms. Mutakyawa, Counsel for the Applicants and Ms. Idda Rugakingira, Counsel for the Respondent.

**G.A.M. NDIKA**  
**JUDGE**  
**27<sup>TH</sup> JUNE 2016**