

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

**MISC. LAND CASE APPLICATION NO.200 OF 2020**

**CRDB BANK.....APPLICANT**

**VERSUS**

**JOYCE DEODATUS KATO.....1<sup>ST</sup> RESPONDENT**

**DEODATUS KATO.....2<sup>ND</sup> RESPONDENT**

**ERADIUS WILLIAM.....3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of Last Order: 14.05.2021*

*Date of Ruling: 27.8.2021*

**OPIYO, J.**

CRDB Bank, the applicant herein above wishes to stay the execution of a decree issued in Misc. Land Application No. 575 of 2018, dated 17<sup>th</sup> March 2020, by Hon. Chenya R.L (Chairperson), resulting from a decree in Land Application No. 12 of 2011, dated 16<sup>th</sup> October 2011, by Hon. Lungw'echa by the District Land and Housing Tribunal for Kinondoni. The applicant has also prayed for costs of the case be borne by the respondent and any other relief which this court will deem fit to grant. The application was brought under section 68 (e) and Order XXXIX Rule 5(1) of the Civil Procedure Code, Cap 33, R.E 2019 and it was supported by the affidavit of the applicant's Advocate, Solanus Ndunguru.

On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not appear to defend the application against them despite the efforts made by the applicant to serve them summons through Mwananchi Newspaper of 20/7/2020. On 8<sup>th</sup> October of 2020, the court ordered the case to proceed *ex parte* against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. As for the 3<sup>rd</sup> respondent, he filed his counter affidavit and advanced a preliminary objection on point of law to the effect that, the application is misconceived and bad in law for being filed in a wrong court. However, the preliminary objection was later dismissed for want of prosecution on 8<sup>th</sup> April 2021 as he failed to prosecute the same and the main application was ordered to proceed into hearing which was by way of written submissions. Mr. Solanius Placidus Ndunguru, learned Advocate appeared for the applicant while the 3<sup>rd</sup> respondent was represented by Advocate Rosemary A Kirigiti.

In his submissions in support of the application, Mr. Ndunguru prayed for the affidavit in support of the application to be adopted and form part of his submissions. He submitted that seeks to stay the execution against the Bill of Cost No. 870 of 2017 filed by the 3<sup>rd</sup> respondent, following an ex-parte judgment and decree obtained on the 16<sup>th</sup> October 2011 by the District Land and Housing Tribunal for Kinondoni District, before Hon. Lungw'echa M. (Chairperson), in respect of Land Application No. 12 of 2011. The reasons for staying the execution of the said case, is that the applicant has filed an Appeal (Appeal No. 64 of 2020) before this Court against the ruling made by Hon. Chenya R (chairman), where the applicant seeks the court's order to set aside the said ruling. The appeal is yet to be heard and if the aforesaid decree in Bill of cost is executed then the applicant as the Public Financial Institution (Financial Bank) will

suffer irreparable loss. Basing on the balance of convenience and common sense, the applicant stands to suffer more if the decree is not stayed.

In reply Advocate Rosemary was of the view that this application was filed before a wrong court as the same was supposed to be filed at the executing court instead of this court. The decree to which stay of execution is sought, emanated from the District Land and Housing tribunal for Kinondoni District and not the High Court Land Division, therefore the proper authority to issue the stay of execution order is the District Land and Housing Tribunal for Kinondoni. She also argued this application is an abuse of court process because, the applicant had already applied for stay of execution in bill of costs on 9/6/2020 before Hon. Wambili Ndunguru which was granted. That, it is surprising as to what the applicant is still applying for.

Having gone through the submissions of both parties, the affidavit in support and counter affidavit against this application, the question need determination is whether the application has merit or not. In his chamber summons, the applicant appears to seek a stay of execution against decision emanating from the District Land and Housing Tribunal for Kinondoni in respect **Misc. Land Application No. 575 of 2018, dated 17<sup>th</sup> March 2020, by Hon. Chenya R.L (Chairperson), which emanated from the** decree of the same court in respect of **Land Application No. 12 of 2011, dated 16<sup>th</sup> October 2011, by Hon. Lungw'echa**. The respondent objects the application stating that the same is incompetent for being filed in the wrong court, since under the provision of law upon which the same has been preferred it has to be

fined at the executing court which is the District Land and housing tribunal that determined the matter and not the higher court. Also that the same had already been granted, the re-application amounts to an abuse of court process.

It is an unfortunate that, the records of the trial tribunal was not before me, by the time I was composing a ruling in this matter which is almost year and half from the date of filing the application (April 2020). Therefore, I was not afforded an opportunity to peruse the same as suggested by the respondent's counsel. But in all, I suspect that, it it was validly granted it mut have been short lived at the that is only done before expiration of the time to appeal in terms of order XXXIX rule 5 (2) of the CPC which states that:-

*"5 (1) N/A*

*(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may, on sufficient cause shown, order the execution to be stayed."*

From the above provision, the court that passed the decree's power to grant stay of execution is only limited to the period before expiration of the time to appeal not after the appeal itself have been filed as in this case. For the reasons, the applicant was obliged to file another application for stay of execution after she filed the appeal. Therefore, this application is not an abuse of court process as argued by the respondent's counsel.

The applicant's insinuation that the application has been preferred under a wrong provision of law is also is conceived. This application has been preferred under order XXXIX rule 5 (1) and (3) of the CPC. These are proper provisions for such application in this court. The provision states that:-

*"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.*

*(2) N/A*

*(3) 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."*

Therefore, the applicant's application is worth consideration by this court. The applicant has already preferred appeal to this court, Land Appeal No 64 of 2020. The Affidavit states at paragraph 6 that, if this application is not allowed, the applicant will suffer irreparable loss as the judgment

debtor has filed a bill of costs application, at the Kinondoni District Land and Housing Tribunal, seeking to recover 30,000,000/= from the applicant as costs of the case. I am in agreement with the applicant that, if he the bill of cost is granted, the appeal will be rendered nugatory as she may not be able to recover the amount, when need be. The application is therefore granted. The execution of the decree in Misc. Land Application is therefore stayed pending determination of Land Appeal no 64/2020. No order as to costs.

Ordered accordingly.



A handwritten signature in blue ink, appearing to read "M.P. OPIYO".

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**M.P. OPIYO,**  
**JUDGE**  
**27/8/2021**