

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

MISC. LAND CASE APPLICATION No. 537 OF 2020

(Originating from Kibaha District Land and Housing Tribunal in Misc. Application No.15 of 2020; High Court
in Misc. Land Application No.535 of 2020)

**SEGORINA P. KIWANGO.....1ST APPLICANT
SEVERIN MTENGA.....2ND APPLICANT
FRIMINI MANGASHI.....3RD APPLICANT**

VERSUS

**DANIEL MATERU.....1ST RESPONDENT
M/S MSOLOPA INVESTMENTS
COMPANY LIMITED.....2ND RESPONDENT**

Date of Last Order: 02.08.2021
Date of Ruling: 30.08.2021

RULING

V.L MAKANI, J

The applicants herein have moved this court under Order XXI Rule 24(1) and (2) of the Civil Procedure Code, Cap 33 R.E 2002 (sic!) seeking for the order that this court be pleased to grant an order of stay of execution of a decree delivered by Kibaha District Land and Housing Tribunal (the **Tribunal**) pending the hearing and final determination of the application for extension of time to file revision and an intended application for revision to be filed in the High Court of Tanzania Land Division.

The application is supported by the joint affidavit of the 1st and 3rd applicants and opposed by the counter affidavit sworn by the 1st respondent.

It was the court's order that the application be argued by way of written submissions. Mr. Roman Selasini, Advocate drew and filed submissions on behalf of the applicants while Mr. Mvano Mlekano, Advocate drew and filed a reply on behalf of the 1st respondent. The 2nd respondent did not file any reply to the submission, the matter therefore proceeded ex-parte against her.

Submitting in support of the application Mr. Roman said that it is stated in paragraph 2 of the affidavit that one officer of the local government of Husika Street received a notice on behalf of Severini Mtenga and Frimini Mangashi requiring them to demolish the development made on the suit land within 14 days. The said notice arose out of Land Application No.15 of 2020. That the notice did not cite the said Land Application No.15 of 2020 that was an application for execution nor a copy of the warrant enclosed with the notice. That

the notice did not indicate where execution should take place. Therefore, he said that the decree is ambiguous.

Mr. Roman further insisted that the 1st applicant is in possession and owner of the suit property which is about to be executed and was not served at all. That she was not party to the Land Application No.15 of 2020 and neither the 2nd nor the 3rd applicant acted on her behalf. He said that the suit filed by the 3rd applicant involve the property which the 2nd and 3rd applicants had common interest and the property which is about to be executed is the one with joint interest with the 3rd applicant but the 2nd applicant has interest on it and it is not the property involved in the original suit. He said that if the 1st applicant was not impleaded in the main application, there is no way she could have known of the existence of the case. He insisted that the 1st applicant came to know about the said decision on 08/09/2020.

Counsel further stated that the 1st applicant is in a situation where she will lose her landed property as she was not a party in the original application and thus, she has not been heard. That the execution is underway, and the 1st applicant has been given 14 days reckoned from the date of notice within which to give vacant possession and

demolish all the investments over the unknown land. That it will be in the interest of justice to stay the execution pending determination of revision because the 1st applicant was not party to the original application and the warrant does not disclose the identity of the said disputed land. He said that if the application for stay of execution is not granted all the application by the applicants in court will be rendered nugatory. He added that granting of this application will occasion no injustice to the respondents since the suit property will be taken by respondents in case the applicant is unsuccessful in subsequent applications. He relied in the case of **SDV Transmi (Tanzania) Limited vs. Ms Ste Datco, Civil Application No.97 of 2004 (CAT-DSM)** (unreported). He prayed for the application to be granted.

In reply, Advocate Mvano prayed to adopt the contents of the counter affidavit and its annexures. He said that the applicant has not shown sufficient reasons to warrant the grant of this application. He said that one of the conditions for the grant of stay of execution is that there must be a pending appeal or revision to the higher Court and that the applicant must deposit security for costs as per order XXXIX Rule 5(3) of the CPC. He said that the conditions are cumulative as they must

all be satisfied. He relied in the case of **Hatibu Omary vs. Belwisy Kumbaza, Civil Application No.33 Of 2018** (unreported). He prayed for this application to be dismissed with costs.

The applicants did not file a rejoinder

It is settled law that, for the application of stay to succeed, there must be pending execution of a decree or arbitration award pending the determination of an appeal or an application for revision. The following factors must have been established:

- (a) Whether the appeal or application has prima facie likelihood of success
- (b) Whether the refusal of staying execution is likely to cause substantial and irreparable injury to the applicant
- (c) Balance of convenience.

(See the case of **Magnet Construction Ltd vs Bruce Wallace Jones, Labor Execution No.11 of 2020 (HC-Musoma)** (unreported).

In this application, the applicant has made two prayers. Firstly, an application for stay of execution pending the application for extension of time to file application for revision and, secondly an application for stay pending the intended application for revision. Now, praying for stay pending an intended application for revision is improper as the intended application is yet to be in court. In my considered view, dealing with an application not before the court would be extraneous and procedurally not viable. For instance, what would be the implication if an order for stay is given as prayed and the applicant decides not to file the intended application for revision? It means the order for stay would be open ended. It is understandable that if an order is given to cover both the application for extension of time and the revision itself would speed up the matter, but it is also understandable that devious parties may use the said order abusively in that they may decide to file the application for revision as they deem fit. In that regard, I will not determine the other part of the application dealing with the intended application for revision as it is premature.

The undisputed fact is that the 1st applicant was not party to both Land Application No.15 of 2020 and original Misc. Land application

No.27 of 2012. It is also undisputed fact that the eviction order and the notice of demolition thereto has already been issued. The 1st applicant also claims that she has interest in the suit property subject to execution. It is also on record that there is before this court an application for extension of time to file revision. It is apparent that if stay is not granted then execution would proceed before the applicant is able to file her application for revision.

Fortunately, the application for extension of time to file revision is also before me, and today I have granted leave for the 1st applicant to file her application for revision within 30 days. In view thereof this application for stay is also granted pending the filing of the said application for revision. There shall be no order as to costs.

It is so ordered


V.L. MAKANI
JUDGE
30/08/2021

