

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC.LAND APPLICATION NO. 276 OF 2021

(Arising from Execution No.22 of 2021

Which originated from Land Case No.115 of 2010 High court Land
Division)

SIWEMA HAMIS ALI.....APPLICANT

VERSUS

KAISI HAMIS [Suing as Administrator

of the Estate of the Late Hamis Ali]..... 1ST RESPONDENT

ZAITUNI HAMISI ALI.....2ND RESPONDENT

RULING

Date of last Order: 8/11/2021

Date of Ruling: 15/11/2021

T. N. MWENEGOHA, J:

The application before me has been filed under the provision of Sections 68 (c and e), 95, Order XXI Rules (1 & 2) and Order XXI Rule 27, 56, 57, 58, and 59 of the Civil Procedure Code Cap 33 R.E 2019 (herein after **the C.P.C**) and Section 51 (i) of the Land Disputes Court Act Cap 216 R.E, Seeking for the court to grant stay of execution No. 22 of 2021, the court be pleased to investigate and ascertain possession, interest and ownership of the property in dispute or source of money in dispute and any other orders and reliefs which the court deem fit and just.

The application is supported by applicant's affidavit dated 07/06/2021

The hearing of this application proceeded by way of written submission. Both parties were represented, while the applicant was represented by

Mr. Khalfan Hamisi Msumi, Advocate, the 1st respondent was represented by Mr. Derick Paschal Kahigi, Advocate and the 2nd respondent appeared in person and unrepresented.

Submitting in support of the application Mr. Msumi started by praying this court to adopt the contents of his affidavit for it to form part of his submission.

Mr. Msumi further submitted that Land Case No.115 of 2010 ended in favor of the (applicant) 1st respondent herein, consequently, the 1st respondent has filed the Execution Case No.22 of 2021 in which the mode of execution opted is arresting and detaining the 2nd respondent herein as a civil prisoner.

He submitted further that, the applicant herein has filed this application for stay of execution pending the determination of her Application No. 03 of 2021 filed before this court seeking an order for extending time within which to set aside the judgment and decree in Land Case No.115 of 2010. That in case the Application No. 22 of 2021 is granted it will render the proceedings of the Application No. 03 of 2021 nugatory. To support this argument, Mr. Msumi cited the case of PRINCESS SHABAHA COMPANY LIMITED V. NIC BANK TANZANIA LIMITED Commercial Case No. 94 of 2015 High court of Tanzania (commercial Division) at DSM, (unreported). When replying Mr. Kahigi, the 1st respondent's counsel submitted that, the applicant is claiming to be the co-owner of the landed property Plot No. 4 Block 18 Mchikichini Kariakoo, Dar es Salaam; a subject matter in Land Case No. 115 of 2010 which the court bestowed in the hands of the 1st respondent. That through the ruling of this court in the Application for execution No. 57 of 2019 the court broker Fosters Auctioneers & General Traders was appointed, and effected the execution on the 20/10/2020.

Mr. Kahigi submitted that the execution process in respect to the Land Case No.115 of 2010 is over, and that what is sought in Execution No. 22 of 2021 is the arrest and detention of the 2nd respondent as a Civil prisoner for failure to remit to the 1st respondent the mesne profit as decreed by the court in Land Case No.115 of 2010. That this has nothing to do with the applicant at all.

To support his argument he cited the case of JUTO ALLY Vs. LUCAS KOMBA & ANOTHER, CAT, Civil Application No. 84 of 2017 (unreported) at p.6 the court had this to say:-

"whether the order of stay will serve any practical purpose ...we are firmly of the view that since the execution has been carried out, we cannot make an order to stay it and that if it caused substantial loss to the applicant, there is no order that can undo that... we reiterate and emphasize that stay of execution as a remedy may not be issued when execution has been carried out "

Furthermore, he argued that the applicant is seeking to stay execution No.22 of 2021, which she is not the party. That the said application is between Kaisi Hamis Ali and Zaituni Hamis Ali. He added that the affidavit supporting this application has not adduced any sufficient reasons/ cause to warrant the court to grant the order sought. That even if the applicant would have satisfied the court still the application should not be granted as it has been filed out of time and the applicant has failed to account for each day of delay as the decree at issue was issued on 22/7/2015. To support this argument, he cited the case of BUSHIR HASSAN Vs. LATIFA LUKIO MAHAYO, Civil Application No. 03 of 2007 (unreported)

Mr. Kahigi also submitted that, all matters pertaining stay of execution by the court which passed the decree are governed and stipulated under Order XXXIX Rule 5(2) and not under Order XXI Rule 24(1) of the C.P.C. He continued to submit that O.XXI Rule 24(1) is invoked when the person is seeking to stay execution in the court to which the decree is sent for execution to enable him to apply to the court which had passed the decree. That, this is not the same with the application at hand as it seeks to stay the decree passed by this court therefore the applicant ought to have cited the provision of Order XXXIX Rule 5(2) of the C.P.C.

The 2nd respondent when replying she conceded to the applicant's application for stay of execution on the reasons that, the applicant is one of the registered owners of the property in dispute and that the applicant had interest in the case number 115 of 2010 but was denied the right to be heard.

Having gone through the parties submission the main issue for determination is whether this application has merits.

It was Mr. Msumi's contention, while supporting the application that the 1st respondent filed the Execution No 22 of 2021 in order to execute the decree issued in the Land Case No.115 of 2010 by arresting and detaining the 2nd respondent as the civil prisoner. That the application at hand intends to stay the execution proceeding pending determination of the Application No. 03 of 2021, filed by the applicant, seeking extension of time to set aside the judgment in Land Application No.115 of 2010.

This was rebutted by Mr. Kahigi in his reply that, Land Case No. 115 of 2010 ended on 22/7/2015 in favor of the 1st respondent, and the execution of its decree took place on the 11/11/2020 through Execution

No.57 of 2019. Therefore that, Execution No. 22 of 2021 is intending to arrest and detain the 2nd respondent as a civil prisoner for non payment of the mesne profit decreed to the 1st respondent in the Land Case No.115 of 2010, hence Execution Case No.22 of 2021 has nothing to do with the applicant. Mr. Kahigi further submitted that the applicant is seeking to stay the execution of the application of which she is not the party, and that she, also, was not the party to the main case, Land Case No. 115 of 2010.

Thorough perusal of the court records and the attached annexures to the affidavit and counter affidavit, that is annexure "KAIS 1" and annexure "D", has revealed that it is true that the execution of decree issued in the Land Case No.115 of 2010 took place in 11/11/2020 and the applicant was not part to the said suit.

Moreover, even if the decree was yet to be executed, still the applicant herein was not a party in both cases the Land Case No. 115 of 2020 and the Execution Case No. 57 of 2019. Also she is not a party to the Execution Case No.22 of 2021. I am therefore in agreement with Mr. Kahigi that she has no locus standi to file application at hand.

Owing to the observation above, the application at hand has no merits, I therefore, proceed to dismiss it with costs.

It is so ordered.

Dated at Dar es salaam this **15th** day of **November, 2021.**




T. N. MWENEGOHA
JUDGE