

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

MISC. LAND CASE APPLICATION NO. 175 OF 2021

(Arising from Execution No. 18 of 2019; Original Land Case No. 117 of 2014)

**MBEZI LUXURY RESORT LIMITED.....1ST APPLICANT
YOHANA HILARIUS NYAKIBARI.....2ND APPLICANT
MACROPS (TANZANIA)LIMITED.....3RD APPLICANT
KIMWAGA RICHARD STIKA.....4TH APPLICANT**

VERSUS

**NATIONAL BANK OF
COMMERCE LIMITED.....1ST RESPONDENT
DANIEL G. MBUGA T/A LEGIT
AUCTION MART COMPANY LTD.....2ND RESPONDENT**

Date of Last Order: 12.11.2021
Date of Ruling: 29.11.2021

RULING

V.L MAKANI, J

The 1st and 2nd applicants herein (the applicants) have moved this court under Order XXI, Rule 27, XXXIX Rule 5(1), (2), (3) and (4) of the Civil Procedure Code, Cap 33 R.E 2019 (the **CPC**), seeking for this court be pleased to grant an order of stay of execution of a decree in Execution No.18 of 2019 dated 1/03/2021 (Hon. Simfukwe, Deputy Registrar as she then was) pending determination of the application for review in Misc. Land application No.168 of 2021.

The application is supported by the joint affidavit of the applicants.

It was the court's order that the application be argued by way of written submissions. Dr. Chacha Murungu, Advocate drew and filed submissions on behalf of the 1st and 2nd applicants while Mr. Zuri' el Kazungu, Advocate drew submissions in reply on behalf of the 1st respondent. The 3rd and 4th applicants did not file any submissions and that was the case with the 2nd respondent.

Submitting in support of the application Advocate Murungu said that under the law, the principal factors that the court should consider in granting an order of stay of execution are whether the pending matter has likelihood of success, whether refusing the application is likely to cause substantial and irreparable loss to the applicant and also the court should consider balance of convenience. He said that the conditions were set out in the case of **Tanzania Electric Supply Company (TANESCO) vs. Independent Power Tanzania Ltd (IPTL) & 2 Others [2000] TLR 324-328..** He said Misc. Land Application No.168 of 2021 is still pending in court for review of the execution dated 15/03/2021. That following such execution order

there was made another order for warrant of attachment of the properties of the 1st and 2nd applicants. That according to para 11 of the affidavit there are irregularities and nullities in both orders by the executing officer, Deputy Registrar. That the order did not cite proper enabling provision concerning warrant of attachment as it relied on Order XXI Rule 88 of the CPC which deals with setting aside warrant of attachment order but not issuance of warrant of attachment. That execution form filed by the 1st respondent lacked proper verification as it was not dated. That all these matters are subject of an application for review in Misc. Application No.168 of 2021 which is yet to be determined by the Registrar as the Executing officer. Counsel insisted therefore that the first test for stay of execution has been fulfilled as there is prima facie chances of success in the pending application for review.

Mr. Murungu argued on the second test that if stay of execution is not granted the 1st and 2nd applicants stands to suffer irreparable loss as their properties will be alienated permanently and unjustifiably and will be sold. That the 2nd respondent has commenced legal process including valuation of the applicants' properties ready for auction. That dismissing this application will render the pending application for

review nugatory. He insisted that the second test for stay of execution has therefore been met.

On the balance of convenience, Advocate Murungu said that respondents are not likely to suffer more harm than the applicants since there is a firm commitment in any eventuality. That respondent's interest is protected by firm commitment undertaken by applicants in their affidavit. That it is convenient for the Court to grant an order in favor of the applicants. Counsel insisted further that this application was filed promptly without delay. He prayed for the application to be granted.

In reply, Mr. Kazungu prayed to adopt the contents of the 1st respondent's counter affidavit. He said that according to the case of **TANESCO** (supra) the applicants must prove three factors for grant of stay of execution.

Mr. Kazungu said that there is no likelihood of success in the pending application for review. That the grounds for review by the applicants are unfounded and devoid of merit. That citing a wrong enabling provision in the warrant of attachment cannot invalidate the order or

make it a nullity. That the irregularity does not affect the order of execution and does not go to the root of execution. Counsel said that the issue of undated verification cannot be raised at this point given that there is already an order of attachment. He insisted that it is not an error apparent on the face of the record to qualify for review. That it should have been raised when the 1st and 2nd applicants were called to show cause why execution should not issue, that the ground is misplaced.

On the second test, Mr. Kazungu replied that it has not been shown by the applicants as to how they would suffer the alleged injustice and irreparable loss should the court refuse to grant this application. That it has not also been depicted by the applicants whether the injury cannot be attorned by way of damages given the fact that the property sought to be disposed are securities the 1st and 2nd applicants willingly mortgaged and agreed that in case of default the 1st respondent would proceed to realize the same. That it is a trite rule that the sale of mortgaged property cannot lead to irreparable loss. He relied on the case of **Kakooza Abdullah vs. Stanbic Bank Uganda Limited, Misc. Application No.614 Of 2012, (HC-Uganda)** (unreported). Counsel further argued that the law has long

been that, for the court to grant an order for stay of execution, to restrain the lender from realizing the security pledged for credit facility, there must be allegations of fraud or corruption or collusion with the purchaser in the sale of the property. Without those allegations the mortgagee should not be restrained from exercising his statutory powers under the mortgage deed only because the mortgagor object to the manner in which the said mortgage powers are carried out. Counsel relied on a number of cases among being the case of **National Bank of Commerce vs. Dar Es Salaam Education And Office Stationery (1995) TLR 272**. Counsel insisted that the applicant has not alleged fraud or existence of corruption or collusion in the intended auction of the security. He said that the 1st respondent is a Commercial Bank operating under supervision of the Central Bank of Tanzania and would be in a better position to meet whatever decree that may be issued against it.

On the balance of convenience, Mr. Kazungu said that the applicants have not shown how they will suffer greater hardship than respondents in case the application is not granted. He said that if the application is granted, it is the 1st respondent who stands to suffer greater hardship than the applicants. That the outstanding credit

facility of TZS 1,574,288,000/= is a trading stock of the 1st respondent which should be recovered so that the Bank will keep on lending in the banking business. That if the respondent does not recover the loan due, it will forcefully be subjected to bankruptcy. Counsel relied further on the case of **PIL Trade & Services Enterprises Ltd vs. TIB Corporate Bank Ltd & Tambaza Auction Mart & General Broker, Misc. Application No.17 Of 2019 (HC-DSM)** (unreported). He said that the loan sought to be recovered is the respondent's customer fund which she borrowed after her customers had credited her account. That respondent pays cost of such funds as interest to the customer from whom the fund is borrowed. That in case the respondent is restrained from recovering the said loan it will be at risk of being sued if it fails to pay on demand the money borrowed from her customer. He added that the respondent keeps on paying income taxes in respect of the said loan until the debt is cleared. Counsel, therefore, insisted that it is the respondent who is likely to suffer grater hardship if this application is granted. He prayed for the application to be dismissed with costs.

In rejoinder, Mr. Murungu reiterated his main submissions and added that the cases cited by the 1st respondent on page 4 to 10 of his submission do not deal with stay of execution rather with injunction.

Having gone through affidavit and submissions from both parties, the main issue for determination is whether this application has merit.

For the application of stay of execution to be granted, the applicant must cumulatively prove that:

- 1. There is a pending suit in which he is likely to succeed.*
- 2. There is likelihood of suffering irreparable loss if the application is not granted.*
- 3. That the balance of convenience tilt in his favour more than respondent.*

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

As aforesaid, the three conditions enlisted above must cumulatively be proved by the applicant. It is not disputed by both parties that there is a pending application for Review No.168 of 2021 in this court. The first test requires consideration of whether there is a prima facie

case against respondents. In the pending application for review, the applicant herein is complaining against irregularities in both orders of execution and order of attachment. That the order of attachment did not cite proper enabling provision of the law and that the execution form was not dated. I am of the view and as correctly submitted by Mr. Kazungu that the alleged irregularities do not affect the order of execution nor does it go to root of the execution. The applicant does not challenge the validity of execution, rather the provision in the warrant of attachment and the verification of the execution form. The applicants do not state how the alleged irregularities can cause injustice on their part. Those errors (if any) do not invalidate the decree of execution. I shall not go into detail least I pre-empt the pending review.

But I have given regard to section 38 (1) of the CPC vis a viz the pending application for review. The said provision states:

38.-(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

The application for review being treated as a suit in the present circumstance, is a separate suit from application for Execution No.18

of 2019. The issues of irregularities in the warrant of attachment and execution form should not have been determined in a separate suit according to section 38 of the CPC rather in the same suit and by the same court. From that piece of analysis therefore, it is the finding of this court that the first test has not been met as the applicant has failed to establish prima facie case against respondent.

Without prejudice to the above, as regards the second requirement it is apparent, as correctly stated by Mr Kazungu that the sale of a mortgaged property cannot lead to irreparable loss as there is a contract between the parties regarding the loan and a provision where default of repayment of the loan is concerned. And in this present situation there was a Deed of Settlement by the parties which is subject of the execution and which the applicant has failed to adhere to. The applicant willingly entered into the Settlement Deed and according to **Kakooza Abdullah** (supra) an order for stay would only be granted where there are allegations of fraud, corruption or collusion. In this present application, the applicant has not raised any allegations of fraud or corruption as such it cannot be stated that she will suffer irreparable loss if stay is not granted. In any case, the applicant would definitely enjoy fruits of her decree if granted in her

favour as the 1st respondent is an institution being supervised by the Bank of Tanzania and therefore cannot go contrary to a decree of the court. (see **PIL Trade & Services Enterprises Ltd** (supra).

As for balance of convenience, it is apparent that if an order for stay is granted the 1st respondent would suffer more for failure to realize the loan as was stated in the case of **Agency Cargo International vs. Eurafrica Bank (T) Limited, Civil Case No. 44 of 1998 (HC-DSM)** (unreported) and **General Tyre East Africa Limited vs. HSBC Bank Plc [2006] TLR 60.**

From the above, it is apparent that the plaintiff has not been able to fulfil the requirements set out for grant of stay of execution. In respect the application is devoid of merit and it is hereby dismissed with costs.

It is so ordered.


V.L. MAKANI
JUDGE
29/11/2021

