

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 725 OF 2020

(Arising from Review Application No. 705 of 2020 before High Court of Tanzania, Land Division)

SHARIFA ALOYCE MSHANA APPLICANT

VERSUS

EXIM BANK TANZANIA LIMITED 1ST RESPONDENT

MABROUK OMAR MOHAMED 2ND RESPONDENT

RULING

Date of last Order: 23.08.2021

Date of Ruling: 24.08.2021

A.Z.MGEYEKWA, J

This is an application brought under Order XXI Rule 68 (1) and 95 of the Civil Procedure Code Cap. 33 [R.E 2019]. The application is supported by an affidavit deposed by Sharifa Alyoce Mshana, the first applicant. The application has encountered formidable opposition from the respondent and has demonstrated

his resistance by filing a counter affidavit, deposed by Mr. Edmund Mwasaga, principal officer of the respondent.

When the matter was called for hearing on 13th April, 2021, the applicant and 2nd respondent were aware that the matter was set for hearing but she did not show appearance. The 1st respondent was represented by Ms. Levina Kagashe, learned counsel.

In his submission the applicant's Advocate reiterating what was deposed in the supporting affidavit, he urged this court to adopt the content of the affidavit and form part of his submission. He stated that it is settled law that for the applicant to be granted an order for a stay he needs to demonstrate whether the appeal has prima facie, likely hood of success, whether the refusal of staying the execution is likely to cause substantial and irreparable injury to the applicant and balance of convenience.

The learned counsel for the applicant went on to state that the application for review has high chances of success as the said application for execution was filed contrary to the settlement agreement reached by the parties as the settlement was executed four months after signing the agreement. He added that the attachment

involves a family house thus if the application will be granted the family will incur irreparable loss and agony of unimaginable scale as the applicant and his family will be rendered homeless and the applicant will be in more inconvenience as he will face eviction from the house which has been attached as will be rendered homeless. To fortify his position he referred this court to the cases of **Haruna Mpangano and Others v Tanzania Portland Cement Co. Ltd**, Civil Reference No.3 of 2007, **Eladius Tesha v Justin Sekumbo**, Civil Application No. 158 of 2007 and **Dr. William F. Shija v Dr. Fortunatus Masha**, Civil Application No.1 of 2002 (all unreported).

On the strength of the above, the applicant's Advocate urged this court to stay execution No.1 of 2018 pending a hearing application for review before this court.

In his reply, on the second limb of the applicant's prayer, the learned counsel for the respondent argued that stay of execution of an order or decree is done at the same court that issued an order or decree, for that reason, it was his view that the instant application is misconceived the same ought to be struck out.

Mr. Mnyele went on to state that in applications for stay of execution, the applicant is required to demonstrate and establish first, whether the appeal has prima facie and likely hood of success. Secondly, whether the refusal of staying the

execution is likely to cause substantial irreparable injury to the applicant, and thirdly, is the balance of convenience.

The learned counsel for the respondent went on to state that the applicant's application is lodged out of time, contrary to Part III of the First Schedule of the Law of Limitation Act Cap. 89 [R.E 2019] which state that an application under the Civil Procedure Code or Magistrate Court Act that the limitation is not provided for should be made within 60 days he added that an application for stay pending review is not specifically provided for under the Civil Procedure Code or the Law of Limitation Act. He further contended that the court issued for the execution of the decree on 21st September, 2020, and this application was filed on 16th December, 2020, a lapse of 85 days, and the remedy is dismissal under section 3 (1) of the Law of Limitation Act.

He continued to complain that there is an application pegged on an application for review which was also filed out of time. He went on to argue that the order of S.H. Simfukwe, Dr. was granted on 21st September, 2020 and he filed an application for review on 8th December, 2020. He claimed that the application cannot succeed for being time barred. To bolster his submission he cited the case of Shell and BP

Tanzania Ltd v The University of Dar es Sallam, Civil Application No. 68 of 1999, the Court of Appeal of Tanzania held that:-

“... stay of execution cannot be refused where it is merely feared that the appeal was filed out of time, but where it is in fact out of time, and no step has been taken to remedy the situation thus rendering the appeal inadmissible.”

The learned counsel for the 1st respondent went on to state that the applicant has not established grounds for grant of stay of execution. He lamented that the applicant's application has no chances of success. He added that the applicant has not denied that he defaulted to pay as per terms of settlement agreement Clause 12 thus the 1st respondent was entitled to execute the decree. He further stated that the 1st respondent is the one who is suffering more due to the applicant's failure to settle the decree and the 1st respondent is going to be affected if the application by the applicant is granted in the sense that there shall be further delays in recovering the amount due from the applicant and the 2nd respondent.

On the strength of the above, the learned counsel for the 1st respondent beckoned upon this court not to grant the stay of execution since the applicant has failed to show the loss which he is going to suffer.

I have opted to address the objection raised by the respondents' Advocate in his submission. The learned counsel complained that the matter before this court is time barred. I fully subscribe to the submission of the learned counsel for the applicant that the issue of point of law was supposed to be raised before hearing an appeal on merit. However, as long as the same is a point of law, then, it can be raised at any time even during an appeal. In the case of **Adelina Koku Anifa & Another v Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported). This court could even in the absence of the grounds of appeal be obliged to address the point of law on jurisdiction. Since this court had a duty to take judicial notice of matters relevant to the case even when the matter is not raised in the memorandum of appeal.

In the case of **Marwa Mahende v Republic** (1998) TLR 249 the court is reminded of its duty to ensure proper application of the laws by the courts below. The Court of Appeal of Tanzania in the case of **Adelina Koku Anifa** (supra) went on to state that:-

"... the court cannot justifiably close its eyes on such glaring illegality because it is his duty to ensure proper application of the laws by the subordinate courts and/or tribunals.."

Guided by the above authorities of the law, and as the practice of the Court, it was forethought for this court to address and determine the issue of preliminary objection first before embarking on the grounds for execution.

The records reveal that the execution was granted and during the exercise of executing the tribunal order, the appellant lodged the instant application on 16th December, 2020 and the execution of the Decree was issued on 21st September, 2020. Counting the days from the date when the execution of the Decree was issued to the date when the applicant lodged this application is approximately 85 days lapsed. Part III of the First Schedule, last Item of the Law of Limitation Act, Cap.89 [R.E 2019] states that an application under the Civil Procedure Code or Magistrate Court Act that the limitation is not provided for should be made within 60 days. Therefore, I fully subscribe to the learned counsel for the respondent submission that the application before this court is time barred.

Nevertheless, reading the record and as per the submissions made by both parties, it seems as the application for execution was granted I found that there is nothing to stay the same was required to be lodged before the determination of execution application.

Having reached the above finding, I deem it superfluous to deal with the prayer sought by the applicant as by so doing amounts to deal with a sterile exercise.

In the upshot, I proceed to dismiss the Misc. Land Application No. 725 of 2020 for being time barred without costs.

Order accordingly.

DATED at Dar es Salaam this 24th August, 2021.




A.Z. MGEYEKWA
JUDGE
24.08.2021

Ruling delivered on the 24th August, 2021 in the presence of Mr. Gabriel Mnyele learned counsel for the respondent and he was holding brief for Mr. Godfrey Samwel, learned counsel for the applicant.




A.Z. MGEYEKWA
JUDGE
24.08.2021