

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

APPLICATION FOR EXECUTION NO. 30 OF 2022

(Arising from Taxation Cause No. 41 of 2021 which Originates from
Miscellaneous Land Case No. 495 of 2020)

JAMES CHRISTIAN APPLICANT

VERSUS

MARY EMMANUEL MMARI RESPONDENT

RULING

Date of last Order: 19/09/2022

Date of Ruling: 30/09/2022

KHALFAN, J.

This application emanates from the Ruling and orders of this Court, W. Hamza-Taxing Master dated 1st day of March 2022. The decree holder was awarded a total of TZS. 5,350,000/=. The decree-holder has filed this application for execution in which he is seeking the assistance of this Court for arrest and imprisonment of the judgment debtor.

At the hearing of this matter, the applicant appeared in person. On the other hand, the respondent enjoyed the services of Mr. Augustine Kusalika, learned advocate. In his submission on behalf of the judgment debtor, Mr. Kusalika submitted, mainly, on two grounds.



Arguing on the first ground, Mr. Kusalika submitted that, there is a notice of appeal making the current application premature. That, there is an application before the High Court at Morogoro District Registry which is set for hearing on 22nd day of September 2022. It was further submitted for the respondent, that, since there is an on-going process of appeal, the application should not proceed pending determination before the Court of Appeal.

The second ground is the arrest and imprisonment of the Judgment Debtor, which he contended that, the Decree Holder was supposed to exhaust other modes of execution prior to resorting to the instant mode. He cited the provisions of **Order 21 Rule 10-42 of Civil Procedure of R.E 2022** in support of his submission.

In response to the respondent's submission, the Decree Holder disagreed in toto. According to him, the instant application was not prematurely filed and argued that, the file was kept pending upon stay. That, the Judgment Debtor was given an opportunity to be heard by Hon. Maghimbi, J. But instead, he filed an omnibus application which he failed to exercise as it was found to be incompetent. The Judgment Debtor advanced similar reasons regarding the pendency of the notice



of Appeal before the Court of Appeal and after the failure of that application, the Decree Holder argued further that there was nothing to stop him from enforcing the award of costs after the Bill of Costs was heard *ex parte*.

Based on the second ground, he submitted that he had followed all the procedures in exhausting other modes of execution. The instant application was filed after his efforts to exhaust other modes of execution had become futile.

As for the rejoinder, the learned counsel for the respondent submitted that, appeal commences when notice of intention to appeal is lodged. He contended that the Decree Holder admits and does not dispute on the existence of the notice to appeal. In so far as he is concerned, it is clear that there is progress before the Court of Appeal. He thus prayed his application to be stayed.

I have given due consideration to the rival submission of both sides. The issue is whether pendency of the notice of appeal is a sufficient cause for not granting any application as is the instant application. There is no dispute that there is a notice of appeal before the Court of Appeal. The position of the law in the case of **Ahmed Mbaraka v Mwananchi**



Engineering and Contracting Co Ltd, Civil Application No. 229 of 2014, is instructive on the issue at stake. In this authority, the Court of Appeal expressed the view that it would be prudent for officers authorizing execution to do so in cases whereby there is no appeal pending or where none of the parties has initiated the appeal process.

However, there is yet a contrary view in the case of **Tanzania Bureau of Standards v Anita Kaveva Maro**, Civil Application No. 54/18 of 2017. The court in this authority held that the observation in Mbaraka's case that execution process ought to stop on initiation of the appeal process was a mere obiter dictum.

It was further decided in **Aero Helicopter (T) Ltd v F.N Jansen** [1990] TLR 142 and **Tanzania Electric Supply Company Limited v Dowans Holding**, Civil Application No. 142 OF 2012, that once notice of appeal has been lodged, the High Court ceases to have jurisdiction over the matter against which notice of appeal is lodged. The High Court cannot order stay of execution pending appeal to the Court of Appeal. At that stage, it is the Court of Appeal which can entertain an application for stay of the execution after filing of notice of appeal. In this application, the Judgment Debtor prayed for this court to grant an



order for stay of execution. However, there is no doubt whatsoever that she did not lodge an application before the Court of Appeal.

In this application there is no doubt that, there is a notice of appeal pending before the Court of Appeal rendering the prayer for stay of execution untenable in law. It is trite law that the court can only stop to grant execution of an order on two grounds, namely, by satisfaction of the decree or order or by the order staying the execution of the same by the court of competent jurisdiction.

The position of the law remains to be that under **Order 39 Rule 5 (1) of the Civil Procedure Code, CAP 33 R.E 2022:**

'An appeal shall not operate as 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 preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree.'

In line with the above position of the law, the pendency of an appeal cannot create as a bar to execution of the order in issue. This is because the Judgment Debtor did not file any application before the Court of



Appeal for stay of execution. This court cannot entertain a prayer for stay of execution in the absence of any application to that effect.

The above position was emphasized by this court in the case of **Mussa Shaibu Msangi v Sumry High Class Limited and Another**, Misc. Commercial Cause No. 20 of 2012, TLSR at pg. 430, as per my brother Songoro, J., while interpreting **Order XXI Rules 9 and 10 of the Civil Procedure**, it was held that the mere fact that there is a pending appeal without order for stay of execution, does not bar the execution of the court decree.

It was asserted by Mr. Kusalika in support of the second ground that the decree holder has not exhausted other modes of execution of decree. In reply, the Decree Holder submitted that he had exhausted other means on modes of execution of Decree to the best of his efforts but did not succeed.

In determining the second ground, this court has to satisfy itself as to whether the conditions mentioned under **Order XXI Rule 39 (2) of the Civil Procedure Code R.E of 2022** exist or not. **Order XXI Rule 39 (2)** provides:



'Before making an order under sub rule (1), the court may take into consideration any allegation of the decree holder touching any of the following matter, namely: -

- a) A decree being for sum for which the judgment-debtor was bound in any fiduciary capacity to account;*
- b) The transfer, concealment or removal by the judgement debtor of any part of his property after the date of institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;*
- c) Any undue preference given by the judgement-debtor to any of his other creditors;*
- d) Refusal or neglect on the part of the judgement-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;*
- e) The likelihood of the judgement-debtor absconding or leaving the jurisdiction of the court with the object or effect of obstructing or*



delaying the decree-holder in the execution of the decree.'

The remaining issue is whether the applicant has exhausted the other modes of execution before this application. The law requires that invoking arrest and detention as a mode of executing a court decree should be done as last resort upon concrete proof of failure of other modes. The applicant claimed to have exhausted other modes of execution. He submitted that he had followed all the legal steps. He asserted that he made an inquiry with the Human Resource Manager, namely, Mr. Hans Solomon from the Bank of Tanzania, where the respondent works, who informed the applicant, that the salary cannot be attached for execution because it is subject to a loan extended to the respondent. He also contended that he made his personal investigation and discovered that the respondent has a house at Kijitonyama area.

However, he stated that the same house is a matrimonial property and so he could not attach it as it may result into another dispute which might delay realisation of his rights. And another property, according to him, is subject to ongoing court proceedings. He further submitted that the respondent has a vehicle which does not belong to her; hence he could not attach the same.



With all the narrated facts hereof, the applicant has not filed any affidavit to support his application. In the absence of an affidavit, such mere words cannot establish the requirement of exhausting other modes of execution.

In the upshot, I find the application before me devoid of merits. I proceed to strike out the application. No order as to costs. It is so ordered.

Dated at Dar es Salaam this 30th day of September, 2022.




F. R. KHALFAN
JUDGE
30/09/2022

Court: This Ruling is delivered in the presence of Mr. James Christian, the applicant and Mr. Augustine Kuslika, Advocate for the respondent this 30th day of September, 2022.




F. R. KHALFAN
JUDGE
30/09/2022