IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION No. 363 OF 2022

(Arising from Misc. Land Application No. 241 of 2021 pending in the High Court of Tanzania, Land Division before Honourable B. S. Masoud, Judge)

ISAAC MINJA .....APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF
CHAMA CHA MAPINDUZI .....1ST RESPONDENT
TEMEKE MUNICIPAL COUNCIL.....2ND RESPONDENT
THE COMMISSIONER FOR LANDS.....3RD RESPONDENT
THE ATTORNEY GENERAL.....4TH RESPONDENT

R U L I N G

Date of last Order:04/10/2022
Date of Ruling:05/10/2022

K. D. MHINA, J.

This application is brought by way of Chamber Summons made under order XXXIX Rule (5)(1), (2), and (4) and Section 95 of the Civil Procedure Code {Cap. 33} [R. E. 20019] ("the CPC").

The Applicant, *inter-alia*, is seeking the following orders: -

i. This Court be pleased to stay execution No. 34 of 2020, which was filed by the 1st Respondent intending to execute the decree passed in

Land Case No. 302 of 2010 pending determination of Misc. Land Application No. 241 of 2021, which is pending in this Court;

ii. Costs of this Application be provided.

The grounds for the application were expounded in the affidavit, which Isaac Minja, the Applicant, swore in support of the application.

The main reasons for the application are found in paragraphs 5, 6, 7, and 9 of the affidavit briefly as follows;

One, the applicant had filed Application No. 241 of 2021 seeking for extension of time to file a Notice of Appeal.

Two, the applicant will suffer irreparable loss if the stay is not granted.

In this application, the applicant was represented by Mr. Khalfan Msumi, learned advocate, while Mr. Paulo Mkenda, also learned advocate represented the 1st Respondent. The 2nd, 3rd, and 4th respondents were represented by Mr. Galus Lupogo and Ms. Elizabeth Nyamiko, both learned State Attorney.

At the hearing, Mr. Msumi submitted that the applicant had instituted Misc. Land Application No. 241 of 2021 seeks an extension of time to file a Notice of Appeal. That intention to appeal is impossible unless the Court

stays the Application for Execution No. 34 of 2020, which the 1st respondent already filed.

He further argued that unless the Court orders a stay of execution, otherwise the applicant will suffer irreparable loss, and the pending application will be rendered nugatory.

In his further submission, he cited **Hotel Travertine and two others vs. NBC Ltd,** Civil Application No. 58 of 2002, on the conditions for granting the stay of execution and elaborated those conditions as follows:-

On the first condition, he said, the applicant must indicate whether or not he will suffer irreparable loss. On this, he argued that the condition fit in the applicant's case because if the stay is not granted, the respondents will continue to execute the decree.

On the second condition to be considered in granting a stay, he submitted that the applicant has a great chance of success if the pending application for an extension of time to file notice is heard.

On the third condition, he submitted the issue of balance of convenience to the parties. He submitted that if the decree were executed, the applicant would suffer more than the respondents.

In response, Mr. Paul Mkenda, learned advocate for the 1st respondent, strongly resisted the application. He submitted that the counsel for the applicant should have indicated to what extent the application for an extension of time would succeed.

He further cited Order 39 Rule 3 (b) of the CPC, which provides that a party seeking a stay of execution should seek it without undue delay.

In the case of **Hotel Travertine** (Supra) cited by the counsel for the applicant, Mr. Mkenda submitted that the case expounded much as to what extent irreparably loss will occur if the stay is not granted. But in this application, the applicant failed to explain to what extent irreparably loss would occur to him if the decree is executed.

He concluded by urging the Court to consider the conditions expounded under Order 39, Rule 5(3) (c) of the CPC governing stay of execution.

On his part, Mr. Lupogo, SA, for the 2nd - 4th Respondents, also strongly opposed the application.

He commenced his submission by citing Order 39 Rule 5(3) (a), (b), and (c) and argued that the conditions stipulated under that Order must exist in cumulative and not interchangeable.

He further stated that, in the applicant's affidavit, he did not state how substantial loss would occur and how it would affect him. The alleged irreparable loss was expected to be well articulated in the affidavit.

He further argued that the property subject to execution was a surveyed landed property. Therefore, it cannot cause an irreparable loss because if the intended appeal succeeds, the applicant will register the property by operation of law. Further, there was no evidence indicating that the applicant would suffer loss. To substantiate his submission, he cited **General Tyre (EA) Ltd vs. HSBC Bank PLC** (2006) TLR 60, where the Court discussed the matters to consider when weighing the balance of probabilities.

On the issue of the likelihood of success of the pending application, he subscribed to what the counsel for the 1st respondent had earlier submitted.

Mr. Lupogo also raised an issue of security for the due performance of a decree as a mandatory condition. He argued that the applicant failed to

comply with that mandatory condition in this application. To substantiate his argument, he cited **Mtoro Jumanne Kasina vs. Lila Jaffer Robert** (HC, Land Division), Misc. Land Application No. 327 of 2021, where it was held that furnishing security for the due performance of a decree is mandatory.

In his further argument, he stated that the provision of Order 39 rule 5 (3) of the CPC is similar to Rule 11 (5) of the Court of Appeal Rules. In that respect, he cited **Airtel Tanzania Ltd vs. Ose Power Solutions,** Civil Application No. 336/01/2017 (CAT) at page 7, where the Court of Appeal, by the import of the provisions of Rule 11 2 (d) (iii), held that an order for stay should not be made unless the Court is satisfied that the security has been given by the applicant for the due performance such a decree or order.

Lastly, he distinguished the case of **Hotel Travertine** (Supra), cited by Mr. Msumi, by submitting that, in that case, the applicant explained how he would suffer irreparable loss. Further, the applicant undertook to furnish security for due performance. Unlike in this application, the applicant had failed to disclose and explain how he would neither suffer irreparable loss nor was unable to furnish security for due performance.

In rejoinder, Mr. Msumi submitted that paragraphs 6 and 9 of the affidavit indicated exhaustively how the irreparable loss would occur on the applicant's part.

On the security for the due performance of a decree issue, he submitted that the condition is unnecessary for granting a stay at the High Court.

He further argued that furnishing security is mandatory under Rule 11 of the Court of Appeal Rules, while under Order 39 Rule (5) (3) of the CPC, it is not mandatory. In that regard, he submitted that the decision of **Airtel Tanzania Ltd** (Supra) is distinguishable because it applied Rule 11 of the Court of Appeal Rules and not Order 39 Rule 5 of the CPC.

In his further submission, he stated that the decision of **Mtoro Jumanne Kisina** (Supra) was persuasive to this Court and was also wrongly decided.

He concluded by submitting that the Applicant was an individual older adult who depended on that house; therefore, he will suffer more than the first respondent, who has many properties.

Having heard both parties, the issue before this Court is a narrow one, ie. *"Whether the conditions for granting stay have been met or not"*

But before going to the merits and demerits of the application, I wish to start by reminding the parties of the "Rules of the game" that parties are bound by what they pleaded in the pleadings because the Court must decide cases on the issue on the record. I said so because, in this application, I will disregard new facts introduced by the bar during the hearing.

On the merits of the application, the entry point is Order 39 Rule 5(1) and (3) of the CPC, which states that;-

> *"5(1)* ***An Appeal shall not operate as a 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 an appeal having been preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree".*
>
> **[Emphasis provided]**

Further to that, Sub Rule 3 provides that:-

"No order for stay of execution shall be made under sub-rule (1) or (2) unless the High Court or court making it satisfied.

a. *That substantial loss may result to the party applying for stay of execution unless the order is made;*
b. *That the application has been made without unreasonable delay;*
c. *That the security has been given by the Applicant for the due performance of such decree or order as may ultimately binding upon him."*

As I said earlier, the applicant, in his affidavit, raised only two grounds:

i. There is a pending application for an extension of time to file notice;
ii. The applicant will suffer irreparable loss.

To start with the first ground, first, it should be noted that there was no pending appeal; what was pending was the application for an extension of time to file a notice of appeal.

As per the cited provision of law above, even an appeal by itself cannot automatically stay the execution. Therefore, the pending application for an

extension of time alone has never been a ground for a stay of execution, considering that even the Appeal itself cannot operate as a bar to execution. There must be sufficient cause and compliance with pre-conditions before granting stay of execution. The most crucial issue in granting or refusing a stay is the pre-conditions stipulated under Order 39 Rule 5 (3) of the CPC. This position is well stressed in several cases by the Court of Appeal of Tanzania, such as **Tanzania Bureau of Standards vs. Anita Kaveva Maro,** Civil Application No 54/18 of 2017, where the Court held that:

> *"A plethora of authorities have elaborated the current position of the court on condition precedent before grant stay of execution."*

Therefore, the presence of an application for an extension of time alone cannot bar the execution of a decree. There are condition precedents before granting or refusing a stay, and the said conditions are stipulated under Order 39 Rule 5 (3) of the CPC.

On the second ground regarding irreparable loss, as raised in the affidavit and argued in the submissions, I will determine it by looking at the guiding principles established by the Court of Appeal in several cases.

In **Tanzania Sewing Machine Co. Ltd vs. CRDB (1996) and another**, Civil Application No. 9/1999 (Unreported), it was held:-

> *"The Court has on a number of occasions held the view that it is not sufficient to assert in general terms that the Applicant will suffer irreparably loss; particulars* ***have to shown of the irreparable loss to be incurred.****"*
>
> [Emphasis provided]

In his affidavit, the applicant stated that the loss he would suffer was when the house in plot No 344 would be demolished.

For me, that is a general statement taking into account the mode of execution applied in the execution was eviction from the Plot. The applicant needs to show particulars on how irreparably loss would occur.

He also failed to show how he would suffer if evicted from the house.

Another critical issue raised in the application is furnishing security for the due performance of a decree. On his part, Mr. Lupogo, who raised this issue, submitted that it was mandatory for a party who seeks stay to furnish security, while on the other hand, Mr. Msumi disagreed and stated that:-

i. Furnishing security is unnecessary at the High Court because it is not mandatory under Order 39 Rule 5 (3) (c).

ii. The decision of the Court of Appeal in **Airtel Tanzania Ltd** (Supra) is not applicable in this Court.

First, I will start with Order 39 Rule 5 (3) (c) of the CPC.

*"No order for stay of execution **shall** be made under sub-rule (1) or (2) unless the High Court or court making it satisfied.*

c. That the security has been given by the Applicant for the due performance of such decree or order as may ultimately binding upon him" **[Emphasis provided]**

The word shall have been interpreted under Section 53 (2) of the Interpretation of Laws Act, Cap 1 [RE: 2019] to mean and apply:-

"53 (2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

According to section 53 (2), Cap 1 of the Laws, it means Order 39 Rule 5(3) (c) is couched in mandatory terms because of the word "shall," which is imperative and obligatory.

Therefore, a function imposed by the word "shall" under Order 39 Rule 5 (3) (c) of the CPC must be performed. The Order mandatorily requires a party seeking for stay of executions must furnish security for the due performance.

Therefore, I hold that Order 39 Rule 5 (3) of CPC makes furnishing of security mandatory as opposed to what Mr. Msumi had submitted.

On the issue of whether the decision of the Court Appeal of Tanzania in **Airtel Tanzania Ltd** (Supra) was not binding to the High Court because the decision was based on Rule 11 (5) (b) of the Court of Appeal Rules, this should not detain me long. I will start by citing the relevant rule i.e

Rule 11 (5) (b) which provides that;

> *"No order for stay of execution **shall** be made under this rule unless the Court is satisfied.*

b. That the security has been given by the Applicant for the due performance of such decree or order as may ultimately binding upon him."

From the above, it is quite clear that Order 39 Rule 5 (3) (c) of the CPC and Rule 11 (5) (b) of the Court of Appeal Rules are similar, with the same objective of making furnishing of security a mandatory condition. The provisions of the laws are in *"pari materia."*

Therefore, the decision of the Court of Appeal of Tanzania in **Airtel Tanzania Ltd** (Supra) is not only distinguishable with the application at hand but also binds this Court as opposed to what Mr. Msumi had submitted.

In the application for stay, the vital issue to note is that the law does not strictly demand that the said security must be given prior to the grant of the stay order; a firm undertaking by the Applicant to provide security might prove sufficient to move the court, see **Mantrac Tanzania Ltd vs. Raymond Costa**, Civil Application No. 11 of 2010 (CAT).

In this application, neither the security was furnished, nor undertaking by the Applicant to provide security was given. The effect of this non-compliance is for the application to be devoid of merits. In **Joseph Antony**

Soares@ Goha vs. Hussein Omary, Civil Application No. 6 of 2012 (unreported), the Court of Appeal of Tanzania held that:-

> *"The Applicant has not furnished security nor he has given a guarantee of security as held in the MANTRAC case (Supra) cited above. The Application for stay of execution therefore lacks merit and it is hereby dismissed with costs."*

In conclusion, as I said earlier, there were matters such as the chances of success of the application and balance of convenience which were not raised in the affidavit. The facts were introduced by the bar during the submissions. Therefore, because the matters were unlawfully and unprocedural introduced, they need not be treated and considered by this Court.

In the upshot, the Application lacks merit, and I dismiss it with costs.

It is so ordered.

THE HIGH COURT OF TANZANIA
LAND DIVISION

K. D. MHINA

JUDGE

05/10/2022