

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 642 OF 2022
(Originating from Land Case No. 241 of 2013)

**SEIF ABDALAH MAPUA (Administrator of the
estate of the late Abdallah Seif) APPLICANT**

VERSUS

REV. WILLIAM MATHAYO MTENGA RESPONDENT

RULING

Date of last Order: 05.12.2022

Date of Ruling: 06.12.2022

A.Z.MGEYEKWA, J

Before me is an application that is brought under Section 38 and Order XXI Rule 27 of the Civil Procedure Code, Cap. 33. [R.E 2019]. The orders sought are:-

1. *This Court, as executing Court to refrain from issuing any order in regards to the order of execution, granted by this court by Hon. S. R, Ding'ohi Deputy Registrar on 26th September, 2018 or to stay the execution pending inter party determination for a stay of execution of the decree in Land Case No. 241 of 2013 of this Court pending in Court of Appeal*
2. *Costs of the Application.*

The application is supported by an affidavit deponent by Seif Abdallah Mapua, the applicant. The application was opposed by the respondent who filed a Counter Affidavit. However, when the matter was scheduled for hearing the applicant neither his counsel appeared in Court. Therefore the Court granted the applicant's prayer to proceed *ex parte* against the respondent.

In supporting this application the applicant's Advocate submitted that they have brought an application under section 38 and Order XXI Rule 27 of the Civil Procedure Code Cap. 33. The learned counsel for the applicant contended that the Judgment debtor has filed Application No. 565/ 17 of 2022 and Application No. 341/42 before the Court of Appeal. The counsel asserted that the povison of section 38 of the Civil Procedure Code Cap. 33

provides that in case there is a question arising between the parties to the suit in which the decree was passed, 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 counsel went on to submit that since the Decree Holder has not benefited from the fruit of the Decree then execution is undue. The Counsel continued to argue that as per Order XII Rule 27 of the Civil Procedure Code Cap.33, the application before the Court of Appeal of Tanzania is between the Decree Holder and Judgment Debtor and there is another application pending before the higher Court.

In conclusion, the learned counsel for the applicant urged this Court to halt Execution No. 83 of 2016 pending the decision of the Court of Appeal of Tanzania. To support his submission he cited the case of **Electric Co v Charles Geroge t/a C.G.Traders**, Civil Application No. 71 of 2001.

A close and careful scrutiny of the submission for the application herein advanced by the learned counsel for the applicant. I find the central issue for consideration and determination is *whether the preliminary objection is meritorious*.

The applicant has filed his application through Chamber Summons and the same is made under section 38 and Order XXI Rule 27 of the Civil Procedure

Code, Cap. 33. The applicant's counsel urged this Court to refrain from issuing any order in regard to the order of execution, granted by this court by Hon. S. R, Ding'ohi Deputy Registrar on 26th September, 2018 or to stay the execution pending inter party determination for a stay of execution of the decree in Land Case No. 241 of 2013 of this Court pending in Court of Appeal. For ease of reference, I reproduce section 33 (1) of the Act, as here under:-

“ 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.”

Based on the above provision of the law, as rightly stated by the counsel for the applicant that anything related to execution shall be determined by the court executing the decree and not a separate suit. Let me find out whether the above-cited provision is relevant to the matter at hand. After a glance at the applicant's application, I noted that the applicant in paragraph 4 stated that the first part of the temporary stay of execution has been already been determined by the Court of Appeal of Tanzania and on 28th June, 2022, Hon. Rumanyika, JR delivered its ruling and declined to make *exparte* order to

stay the execution. Having failed to surmount that hurdle, the applicant opted to file the instant application before this Court on 5th October, 2022, and in paragraph 8 of his affidavit he urged this Court to stay execution while he is aware that execution was executed on 20th April, 2016, six years lapsed. Therefore, in the circumstances at hand, I find that the application is devoid of merits because there is no any pending execution before this Court. Therefore Order XXI Rule 24 (1) of the Civil Procedure Code Cap.33 [R.E 2019] is inapplicable since the execution already took place.

The counsel for the applicant in his submission tried to convince this Court that the Decree Holder has not realised the fruits of the decree which is undue. In my considered view, the applicant's application is made from the bar that the applicant is not praying for a stay of execution rather the applicant is praying for this Court not to issue further orders of execution while there is nothing left before this Court. Consequently, I find that coming back to this Court and praying for the same orders as prayed before the Court of Appeal of Tanzania is an abuse of the court process.

For clarity purposes, I have read the case of **Matsushita Electric Co** (supra), in the cited case, the Court interpreted Order 38 (1) of the Civil Procedure Code, Cap. 33 and stated that an application for a stay of execution cannot

be said be a separate suit. This is not disputable, however, the said provision of the law cannot apply in the matter at hand based on the above scrutiny. To the contrary, the cited case of **Matsushita Electric Co** (supra) squarely applies to the matter at hand, Court on page 6 paragraph 4 stated that has execution been complete? If it has, then this application for a stay of execution is superfluous. I find that filing the instant application after a lapse of six years while the said execution was already executed is superfluous and an abuse of the court process.

From the aforesaid findings, it is obvious that the current application has been overtaken by events, hence it has no legs to stand on. I proceed to strike out the application without costs.

Order accordingly.

Dated at Dar es Salaam this 06th December, 2022.




A.Z.MGEYEKWA
JUDGE

06.12.2022

Ruling delivered on 06th December, 2022 in the presence of Mr. Fredy Mmasi, counsel for the applicant.




A.Z.MGEYEKWA
JUDGE
06.12.2022