

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

MISC. LAND APPLICATION NO. 513 OF 2020
(Arising from High Court Land Case No, 224 of 2014)

PENDO FLUEGENCE NKWENGEAPPLICANT

VERSUS

DR. WAHIDA SHANGALIRESPONDENT

R U L I N G

Date of last Order:03/10/2022

Date of Ruling:13/10/2022

T. N. MWENEGOHA, J.

The applicant had approached this Court praying for stay of execution of the Decree in Land Case No. 224/2014 and Execution No. 51/2022 in the High Court of Tanzania, Land Division.

The applicant was represented by advocate Alex Balomi while the respondent was presented by advocate Francis Mgaya.

Before hearing of the application, the respondent raised two preliminary objections on the point of law that the Court has no jurisdiction to entertain the present Application and that the Application is incompetent for wrong as

well as non-citation of the proper provisions of law for the orders sought. The preliminary objection was heard by way of written submissions.

In support of the preliminary objections on the point of law the respondent argued that the applicant is asking this Court under Order XXI Rule 24(1) of the Civil procedure Code, Cap. 33 R. E. 2019 (the CPC) to stay execution of this Court's Decree which was issued on 31/05/2016 (Mutungi, J.) in Land Case No. 224/2014. That the execution application followed the decision of the Court of Appeal in Civil Appeal No. 368 of 2020 dated 25/03/2022 which dismissed the applicant's appeal. It was their view therefore that the cited provisions of law refer to the transferee Court i.e the Court where the Decree has been sent for execution. That, in their view this Court being the Court which passed the Decree (Mutungi, J.) it has no jurisdiction to entertain the stay application under cited provisions of law because it is not a transferee Court, but a Court which passed the Decree. It was their argument that if this Court entertains the application, then it will be wrongly usurping the jurisdiction of the transferee Court.

Furthermore, they submitted that even if it assumed that this Court is a transferee Court, still it lacks jurisdiction to entertain the present application for stay of execution because there is a pending Review Application to the Court of Appeal.

The respondent informed this Court that applicant in the present application lodged to the Court of Appeal a Civil Appeal No.368 of 2020 which was on 25/03/2022 dismissed for lack of merits. That following that dismissal order the applicant applied for the Review application which is pending to the Court

of Appeal. They submitted that once there is a matter pending to the Court of Appeal, then the High Court ceases to have jurisdiction to entertain the Application for stay of execution. That it is the Court of Appeal which has jurisdiction to entertain and issue a stay order and not otherwise as per the case of **Aero Helicopter Limited vs. F. N. Jansen (1990) TLR 142**. It was their prayer that this Court dismiss the Applicant's application for lack of jurisdiction.

Submitting on the second preliminary objection, they argued that the applicant's Application is incompetent for wrong as well as non-citation of the proper provisions of law for the orders sought. That, as this Court is the one which passed the Decree intended to be executed it is not moved by the provisions of law cited by the applicant, that is Order XXI Rule 24(1) of the CPC. That the cited provision applies to the transferee Court and not to the Court which passed the Decree. It was their submission that this Court should be moved properly by Order XXXIX Rule 5(1) of the CPC which empowers the Court which passed the Decree to issue a stay order.

It was their submission that as this Court is not properly moved, the Application is incompetent as it was decided in the case of **National Bank of Commerce vs. Sadrudin Meghji (1998) TLR 503 at page 508**.

They added that even though Section No. 95 of the CPC has also been cited by the applicant as one of the enabling Section of the stay of execution application, the said section will not assist the applicant as it can only be where the law (CPC) has made no provision(s) governing the particular

matter at hand (stay of execution application in this case). Therefore, since Order XXXIX Rule 5(1) of the CPC is the proper provision for issuing a stay order by the Court which passed the Decree, then Section 95 is inapplicable. It was their prayer the preliminary objection be upheld with costs.

In her reply, the applicant was of the agreement that there is Civil Application for Review designated No. 394/01 of 2022 at the Court of Appeal and that they approached this Court with prayers for stay execution of the Decree dated 31st day of May, 2016 in Land Case No. 224/2014 by Hon. B.R. Mutungi, J. in respect of a suit land held under Certificate of Title No. 102722, Plot No. 1366 Block "A" Kinyerezi, Ilala Municipality Dar es Salaam City pending the outcome of any other order that may eventually be made on the Review in the Court of Appeal of Tanzania at Dar es Salaam.

It was their argument that as the procedure of Review is mere filing a Notice of Motion and no Notice of Appeal is firstly lodged, then this Court still has jurisdiction to entertain the application as the Notice of Appeal is the only one which has the legal consequence of doing away with the jurisdiction of the High Court. It was their argument that the Court decision of **Aero Helicopter Limited** (supra) is distinguishable to their case

Regarding the second objection, the applicant argued that the provisions of the law used to move the Court are correct. That even so, in matters of technicalities the Court is encouraged to apply the overriding objectives and do away with technicalities. He referred to a case from Court of Appeal of

Tanzania between **NIMROD MKONO VS. STATE TRAVEL SERVICE (1992) TLR** where in declining to entertain objections, the Court held that:-

"....we would like to mention that justice should always be done without undue regard to technicalities."

The applicant further argued that all the raised preliminary objections should be on the points of law and not on factual matters to be given in evidence during the trial. Hence objections raised do not qualify as objections as per requirement of the case of **Mukisa Biscuits Manufacturing Co. Limited vs. West End Distributors Limited 1969 E. A. 696.**

She prayed for the Court to dismiss the objections with costs.

I have considered the arguments advance in the preliminary objections and the rebuttal from the applicants with great weight in order to determine the merit of the preliminary objections raised. Clearly from the submissions from both parties and in particular facts given by the applicant, it is undisputed that there is a Review Application pending in the Court of Appeal. However, the applicant's advocate was of the view that this Court still has jurisdiction to entertain the matter as the execution proceedings are before this Court.

At this juncture I wish to go back to the case of **Aero Helicopter Limited** (supra) referred by the respondent. The matter was similarly that of stay of execution pending appeal to the Court of Appeal. In the matter, the learned counsel for the respondent objected for Application of stay of execution raised at the Court of Appeal arguing that the same should have been lodged

at the High Court. He argued further that the High Court has concurrent jurisdiction with Court of Appeal to order a stay of execution pending a matter in the Court of Appeal. It was the opinion of the Court of Appeal that once appeal proceedings to the Court of Appeal have been commenced the High Court has no jurisdiction to order a stay of execution pending appeal to the Court of Appeal. Similarly, the Court of Appeal was of the view that the High Court has no concurrent jurisdiction with Court of Appeal in ordering stay of execution when the matter is pending at the Court of Appeal.

The counsel for the applicant distinguished the **Aero Helicopter case** arguing that as their matter is a Review there is no Notice of Appeal and hence they have not filed a Notice of Appeal but rather a mere Notice of Motion. Therefore, this Court is still vested with jurisdiction as Notice of Motion does not have the same effect as Notice of Appeal. I find this argument to be far fetched.

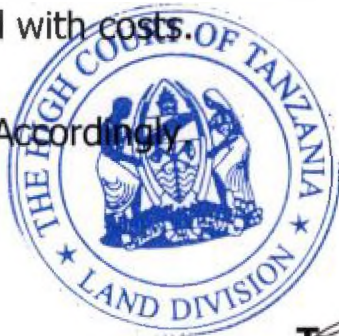
I agree that appeal starts with notice, but the question is why notice? Notice signifies intention to prosecute at the Court of Appeal. Similarly, a Notice of Motion signifies the same intention, to prosecute at the Court of Appeal. It cannot be reduced to an inconsequential action as the Counsel for the applicant wants us to believe. The question that follows then is whether the applicants have established their intention to prosecute a case at the Court of Appeal, through a Notice. If this is answered in affirmative, then, guided by the principle laid down in **Aero Helicopter Limited** (supra) our jurisdiction ceases.

Whether there is a Review or not at the Court of Appeal is not in dispute as the applicant's counsel has informed this Court that there is an Application for Review designated number 394/01 of 2022 at the Court of Appeal. Therefore, it is well established that there is a matter pending in the Court of Appeal.

Consequently, the High Court jurisdiction ceases as the two Courts do not have concurrent jurisdiction.

In the result the first preliminary objection is sustained with costs. Further, I see no need to address the remaining preliminary objection as the first one has the capacity of disposing the entire application. In the end application is dismissed with costs.

Ordered Accordingly



T. N. MWENEGOHA

JUDGE