

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

**MISC. LAND APPLICATION NO. 416 OF 2022**

(Originating from Civil Application No. 105 of 2017 and Execution No. 63 of 2022)

**ALEX MSAMA MWITA.....APPLICANT**

**VERSUS**

**EMMANUEL NASUZWA KITUNDU.....1<sup>ST</sup> RESPONDENT**

**WWF TANZANIA PROGRAM OFFICE.....2<sup>ND</sup> RESPONDENT**

Date of Last Order: 30.11.2022  
Date of Ruling 07.12.2022

**RULING**

**V.L. MAKANI, J**

The applicant ALEX MSAMA MWITA is praying for the following orders:

- 1. That this honourable court may be pleased to stay the execution of the Eviction Order in respect of the property which is situated at Plot No. 126 Msasani Beach Area Kinondoni Municipality in Dar es Salaam Tanzania with CT No. 22284 pending finalisation of Misc. Civil Application No. 538 of 2020 for extension of time to file revision out of time pending before the Court of Appeal of Tanzania sitting at Dar es Salaam.*
- 2. Cost of this application be provided for*
- 3. Any other relief(s) and directions as this Honourable Court may deem necessary to grant in the interest of justice.*

The application is made under Order XXXIX Rule 5(1) and (2) and section 95 of the Civil Procedure Code CAP 33 RE 2019 and is

supported by the affidavit of the applicant herein. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed counter-affidavits in opposition of the application.

With leave of the court the application proceeded by way of written submissions. The submissions on behalf of the applicant were drawn and filed by Mr. Augustine M. Kusalika, Advocate; while Mr. Kennedy Mgongolwa drew and filed submissions in reply on behalf of the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent did not file any submissions.

Submitting on the application Mr. Kusalika prayed to adopt the contents of the affidavit by the applicant herein. He gave a brief history of the matter which was a bit mixed up for understanding. However, Mr. Kusalika, for what I grasped, submitted that there was a Deed of Settlement between the applicant and the 2<sup>nd</sup> respondent which according to the applicant was made under coercion and the applicant has not been paid USD 300,000 by the 2<sup>nd</sup> respondent as agreed. He went on to say that in December 2020 the applicant filed Misc. Application No. 538 of 2020 for extension of time to file revision out of time but it was struck out by the Court of Appeal. And on 27/10/2022 the applicant filed another application, Civil Application No. 670/17 of 2022 which is yet to be determined. Mr. Kusalika said

the 2<sup>nd</sup> respondent is intending to evict the applicant's tenants from the property situated at Plot No. 126 Msasani Beach Area Kinondoni Municipality in Dar es Salaam Tanzania with CT. No. 22284 (the **suit premises**) while there is a pending application at the Court of Appeal. He said the Application for Execution which order of eviction has been issued against the applicant was not served on the applicant and the application proceeded without giving the applicant the right to be heard contrary to the provisions of the law hence it was null and void. He said the application at the Court of Appeal is for extension of time to file an application for revision to challenge the Consent Order given to the 2<sup>nd</sup> respondent. He said the applicant has demonstrated that there is an application for extension of time to file an application for revision at the Court of Appeal and if an order of stay is not granted the applicant will suffer irreparable loss. He said since there is an application pending in the Court of Appeal this court should grant an order for stay of execution of the Consent Decree arising from Land Application No. 66 of 2022. He prayed for this application to be granted with costs.

In reply Mr. Kennedy Mgongolwa was very precise. He said this application is for an order for stay pending finalisation and

determination of Civil Application No. 538 of 2022 which by then was pending at the Court of Appeal. Mr. Mgongolwa submitted that the said application was dismissed with costs by the Court of Appeal and therefore the application has been overtaken by events. He further pointed out that the applicant said he has filed another Civil Application No. 670/17 of 2022 on 27/10/2022 but he said parties are bound by their pleadings and this aspect of a new application in the Court of Appeal is not pleaded in the affidavit of the applicant. He relied on the case of **Abbas Ally Athuman Bantjulaki & KCB Bank Tanzania Limited vs. Kelvin Victor Mahity, Civil Appeal No. 385 of 2019** (unreported). He further observed that submission is not evidence but just summarization of what has been pleaded in the affidavit and therefore all facts which has not been pleaded in the affidavit must be disregarded since it is evidence from the bar. He said what the court has on record is existence of Civil Application No. 538 of 2020 (paragraph 7 of the affidavit).

Mr. Mgongolwa further said Order XXXIX Rule 5(3) which is the basis of this application gives statutory requirements to be met before grant of stay. He said the affidavit does not show that the applicant has met these conditions. The applicant has not furnished security

for the due performance as required and he has not provided details regarding substantial loss which may result therefrom. He said the statutory requirements are three and they must be cumulatively met as was said in the case of **Juto Ally vs. Lucas Komba & Another, Civil Application MO. 84 of 2017** (unreported). He further said the loss stated by the applicant in paragraphs 5 and 6 of his affidavit, that is, USD 300,000 is unfounded and not supported by details. He said looking at **Annex GF-1** of the Affidavit and **Annex W-1** of the 2<sup>nd</sup> respondent's counter affidavit it is clear that there is no clause which provides for compensation or payment of the said amount. He said the amount is the creation of the applicant with intention to mislead the court. He said according to the case of **Khamis Ally Khamis vs. Said A. Mbagga & Another, Misc. Land Application No. 680 of 2021** (unreported) failure to furnish security for the due performance and to show how the applicant will suffer substantial loss is fatal which warrants dismissal of the application. He thus prayed for the application to be dismissed with costs for failure by the applicant to fulfil the statutory conditions as per the dictates of Order XXXIX Rule 5(3) of the CPC.

The applicant did not file any submissions in rejoinder.

I have gone through the rival submissions by Counsel for the parties herein. It is not in dispute that there was a pending application before the court namely, Misc. Civil Application no. 538 of 2022 and that this application was dismissed by the Court of Appeal. And as said by Mr. Kusalika in his submissions, there is another application in substitute and that is Misc. Civil Application No. 670/17 of 2022 now pending in the Court of Appeal. As correctly said by Mr. Mgongolwa the present application herein depends on Misc. Civil Application No. 538 of 2022 which has been pleaded by the applicant in his affidavit (paragraph 7) and since it has been dismissed then there is nothing pending to warrant an order for stay. Mr. Kusalika in his submissions have all along been stating the other application in substitute of the dismissed application but the substituted application has not been pleaded anywhere and the law is quite clear that parties are bound by their pleadings. Mr. Kusalika has annexed to the submissions the Notice of Motion of Misc. Civil Application No. 670/17 of 2022. However, it is settled law that annexures to written submissions are not evidence and cannot be used to introduce evidence. In other words, the averments of fact that there is another application at the Court of Appeal, that is, Misc. Civil Application No. 670/17 of 2022 are mere statements from the bar which are not supported by any evidence. In the case of **Tanzania Union of**

**Industrial & Commercial Workers (TUICO) at Mbeya Cement Company Ltd vs. Mbeya Cement Company Limited & National Insurance Corporation (T) Limited [2005] TLR 41** the Court held:

*"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence offacts and, where there are such annexures to written submissions, they should be expunged front the submission and totally disregarded."*

The notice of motion attached to the applicant's submission cannot be introduced as evidence as it is neither an extract of judicial decision or textbook as such it is expunged from the record. In that respect the reliance on Misc. Civil Application No. 670/17 of 2022 is a misconception intended to mislead this court.

In the result there is nothing pending for this court to stay. As correctly stated by Mr. Mgongolwa the application has been overtaken by events and I hold as such. Subsequently, the application is struck out with costs. It is so ordered.



  
**V.L. MAKANI**  
**JUDGE**  
**07/12/2022**