

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

**MISC. LAND APPLICATION NO.398 OF 2021**

(Arising from Land Case No.147 of 2009 and Misc. Application No. 540 of  
2019 at High Court)

**GEORGE BENEDICT LUPEMBE ..... APPLICANT**

**VERSUS**

**EXIM BANK TANZANIA LIMITED .....RESPONDENT**

**RULING**

*Date of last Order: 22.03.2022*

*Date of Ruling: 29.03.2022*

**A.Z.MGEYEKWA, J**

The application is brought under a certificate of urgency. The applicant has filed an application for a stay of execution of the decree passed in Land Application No. 147 of 2009 pending the determination of the applicant's application for an extension of time to lodge a Notice of Appeal against Land Case No. 147 of 2009. The application is brought under Order XXI

Rule 24 (1) of the Civil Procedure Code Cap. 33 [R.E 2019]. The application was supported by an affidavit sworn by Dr. Ashery Fred Utamwa, learned counsel for the applicant. The respondent opposed the application by filing a counter-affidavit deposed by Stanslaus Ishengoma, learned counsel for the respondent.

On 4<sup>th</sup> November, 2021 when the matter came for hearing, the applicant enlisted the legal service of Ms. Julita Suluhu, learned counsel and the respondent enjoyed the legal service of Mr. Stanslaus Ishengoma, learned counsel. By the court order, the application was scheduled to be disposed of by the way of written submissions whereby the applicant was required to file his submissions in chief on or before 18<sup>th</sup> November, 2021. The respondent was required to file a reply before or on 2<sup>nd</sup> December, 2021. A rejoinder if any was scheduled on 10<sup>th</sup> December, 2021, and mention was set on 14<sup>th</sup> December, 2021. When the matter was called for mention on 14<sup>th</sup> December, 2021 Mr. Stanslaus Ishengoma prayed for an extension of time to file a reply, his prayer was granted whereas the respondent's counsel was ordered to file his reply on 29<sup>th</sup> December, 2021, and a rejoinder if any to be filed on 5<sup>th</sup> January, 2022. The mention was scheduled on 22<sup>nd</sup> March, 2022.

In support of this application, Dr. Ashrey urged this court to adopt the applicant's affidavit and all appended documents thereon to be adopted and form part of his submission. He stated that the applicant seeking for staying execution of decree in Land Application No. 147 of 2009 which was passed on 12<sup>th</sup> March, 2021. Ordering the arrest of the applicant as a civil prisoner for six months for failure to pay an outstanding balance of Tshs. 71, 319,087.26 to the respondent pending the determination of an appeal that would emanate from Misc. Land Application No. 399 of 2021 for extension of time to file an appeal to the Court of Appeal of Tanzania against the decision of this court in Land Case No.147 of 2009.

The learned counsel for the applicant went on to submit that the Misc. Land Application No. 399 of 2021 was filed in this court since this is the court that issued the disputative decree and there is no appeal so far made by the applicant. It was his view that the stay of execution would have been filed at the Court of Appeal of Tanzania if the appeal process had been commenced, but since there is no Notice of Appeal at the Court of Appeal of Tanzania then it will be premature to file an application for stay of execution at the Court of Appeal of Tanzania.

The learned counsel for the applicant went on to submit that there are general rules and guiding principles which must be satisfied before the court may grant an order for stay execution. To buttress his contention, he cited the case of **Tanzania Electric Supply Company (TANESCO) v Independent Power Tanzania Ltd and 2 others** [2000] TLR 324. The learned counsel for the respondent argued that the applicant has overwhelming chances of success; one, it is uncontested fact that determination of the Land Case No. 147 of 2009 was marred with numerous serious illegalities. He argued that this court decided the subject matter had no jurisdiction to entertain the case contrary to section 40 (2) (b) of the Magistrates; Court Act, Cap. 11 [R.E 2019].

Two, the trial court wrongly entertained the dispute as if it was a land dispute while the same was a civil case. Fortifying his submission he cited the case of **William Sabuka v Safari Sipembo**, Land Appeal No.31 of 2018. He went on to submit that the jurisdiction of the court is a creature of statutes, to support his stand he cited the case of **Fanuel Mantiri Ng'unda v Herman M. Ngunda**, Civil Appeal No. 8 of 1995. The learned counsel for the applicant went on to submit that the aspect of the balance of convenience supports the grant of stay of execution in that if the stay of

execution is granted the respondent would not be affected monetarily since the execution seeks to imprison the applicant and the applicant does not intend to conclude the matter between the parties.

The learned counsel for the applicant argued that this court is not *functus officio* to grant the stay of execution as stated by the respondent in his affidavit that since the matter was heard *ex parte* then it was wrong for the applicant to apply for staying of execution in the same court. To support his submission he cited the case of **Cipex Company Ltd v Tanzania Investment Bank, (TIB)**, Civil Appeal No. 197 of 2018 (unreported).

On the second objection on non-provision of security, the learned counsel for the applicant argued that the same is not applicable in the application at hand which is made under Rule 24 (1) of the Order XXI of the Civil Procedure Code Cap.33. It was his view that the requirement of security is made optional by the law.

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to grant the application and stay execution of a decree aforesaid with costs.

Opposing the application, Mr. Ishengoma was brief and focused. He submitted that there are preconditions for the grant of stay of execution which includes; the substantial loss that may result to the party applying for staying of execution unless the order is made, that the application has been made without unreasonable delay and that the security had been given by the applicant for the due performance of such decree as may ultimately be binding upon him. The learned counsel for the respondent submitted that the three preconditions have all to be met such that act conjunctively.

Mr. Ishengoma continued to argue that as per the second condition whether the application was filed within time, he stated that the decree sought to be stayed is dated 23<sup>rd</sup> July, 2015 and his application was filed on 4<sup>th</sup> August, 2021. He went on to submit that as to the third condition, the applicant is required to give security for the due performance of the decree. He argued that in the entire averments of the applicant's affidavit supporting the application nothing is stated as given security and indeed no security has been furnished. It was his further submission that failure to comply with the preconditions for the grant of the stay of execution amount to a refusal to grant the prayer for a stay of execution.

The learned counsel for the respondent did not end there. He submitted that in his understanding once a party files a Notice of Appeal to the Court of Appeal then this court ceased to have jurisdiction on the matter and if the applicant had to file the instant application for stay for execution at the Court of the Appeal of Tanzania. To support his submission he stated that the applicant has filed a Notice of Appeal on 18<sup>th</sup> March, 2021, and served the respondent on 3<sup>rd</sup> May, 2021.

On the strength of the above submission, Mr. Ishengoma beckoned this court to find that the applicant's application for a stay of execution is devoid of merits and should be dismissed with costs.

In his short rejoinder, the applicant's counsel reiterated his submission in chief. He added that the respondent has raised a new issue which is not featured in his counter-affidavit that the applicant was supposed to be filed at the Court of Appeal of Tanzania. In his view, this ground is an afterthought. He urged this court to disregard this allegation.

Having heard the submissions of both learned counsels, I embark on determining the merit of this application. The conditions for the stay of execution regarding the issue of security are provided for under Order XX Rule 27 of the Civil Procedure Code Cap.33 which states that:-

*" Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to the security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided."*

I have gone through the applicant's affidavit to find out if she has stated any good cause to warrant this court to grant his application as stated under Order XXXIX Rule 1 of the Civil Procedure Code Cap.33. The applicant in his affidavit has moved this court to grant his application by stating that he has a high chance of being granted an extension of time to file a Notice of Appeal and that the respondent will not suffer any loss since execution seeks to imprison the applicant. Order XXXIX Rule 5 (3) of the Civil Procedure Code Cap.33 provides that:-

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

*(a) that substantial loss may result in the party applying for stay of execution unless the order is made;*

*(b) that the application has been made without unreasonable delay; and*



*(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."*

I understand that in the strict sense of the court decisions, it does not necessarily mean that a party has to give such security. Each case needs to be determined on its own merit. In the instant application, the applicant is seeking for stay the order of this Court to commit him to a civil prison pending the determination of the application for an extension of time to appeal to the Court of Appeal of Tanzania. It is my firm opinion that since the subject matter of the order is the applicant himself, there is no need of furnishing security for execution of the order. I am holding so because the execution of the order of this Court has financial implications on the part of the respondent as he will be required to take care of the applicant while in prison.

In the circumstance of the matter at hand, wisdom calls loudly that the order of this Court to commit the applicant to Prison as a civil prisoner be suspended pending determination of the matters in the Court of Appeal.

In the final analysis, I grant the application at hand without costs in the manner that the order of this Court to commit the Applicant to prison as a

civil prisoner is suspended pending the determination of matters in the Court of Appeal.

Order accordingly.

Dated at Dar es Salaam this 29<sup>th</sup> March, 2022.



  
A.Z.MGEYEKWA  
**JUDGE**  
29.03.2022

Ruling delivered on this 29<sup>th</sup> March, 2022, in the presence of Dr. Ashery Utamwa, learned counsel for the applicant.



  
A.Z.MGEYEKWA  
**JUDGE**  
29.03.2022