

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

**MISC. LAND APPLICATION NO.680 OF 2021**

(Arising from the decision of Land Case No.67 of 2004, Land Review No.  
651 of 2021, and Execution Proceedings at the High Court)

**KHAMIS ALLY KHAMIS ..... APPLICANT**

**VERSUS**

**SAIDI A. MBAGA ..... 1<sup>ST</sup> RESPONDENT**

**VERONICA KIBWANA (As administratrix  
of the estate of the late JACOB KIBWANA) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of last Order: 31.03.2022*

*Date of Ruling: 01.04.2022*

**A.Z.MGEYEKWA, J**

This is an application for stay of execution of the decree passed in Land Application No. 67 of 2004 pending the determination of Civil Revision vide Civil Application No. 535/17 of 2021. The application is brought under section 68 (c) and (e) of the Civil Procedure Code Cap. 33 [R.E 2019]. The

application was supported by an affidavit sworn by Khamis Ally Khamis, the applicant. The respondent opposed the application by filing a counter-affidavit deponed by Rita Odunga Chihoma, learned counsel for the respondents.

On 24<sup>th</sup> February, 2022 when the matter came for hearing, the applicant appeared in person and the respondents enlisted the legal service of Mr. Melania Mashauri assisted by Ms. Queen Sango, learned counsel. Ms. Melania requested to argue the application by way of written submission. By the court order, the application was scheduled to be disposed of by the way of written submission whereby the applicant was required to file his submission in chief on or before 10<sup>th</sup> March, 2022. The respondent was required to file a reply before or on 24<sup>th</sup> March, 2021. A rejoinder if any was scheduled on 31<sup>st</sup> March, 2022, and mention was set on 31<sup>st</sup> March, 2022.

In support of this application, the applicant was brief. He urged this court to grant his application for stay of execution and or lifting of any process of execution of the decisions arising from Land Case No. 67 of 2004 by Hon. Mwaimu, J and Land Review No, 651 of 2020 by Hon. Mgeyekwa, J pending the determination of Civil Revision in Civil Application No. 545/17 of 2021. To buttress his submission he referred this court to the cases of **Attilio v**

**Mbowe** [1969] HCD 284 and **Suryakant D. Ramji v Savings and Finance Ltd** [2002] TLR 121. The applicant went on to submit that there are anomalies or illegality and ambiguity in the decisions of this court which attracts the attention of this court. The applicant submitted that in Land Review No. 651 of 2020 Hon. Mgeyekwa, J on page 17 deleted the date 11.06..2014 and replaced the same with the date 27.05.2014 while there is no any decision which was delivered on 27.05.2014. He added that the error is supposed to be quashed and set aside by way of revision which is pending the Court of Appeal of Tanzania. The applicant added this is the main reason for applying for the stay of execution based on the said irregularity.

The applicant continued to argue that there is a triable issue in Land Case No. 2004 by Hon. Mwaimu, J that omission in the said case is fatal and incurable since there was a non-joinder of administratrix after his death and the same was out of 90 days of alleged death. He added that the donor and done or seller and purchaser of the land cannot both have the same title and have the right to sue for recovery of ownership, he claimed that in Land Case No. 67 of 2004 and Land Review No. 651 of 2020 the donor/seller became a witness to the done/purchaser. He added that the plots in dispute are different from what the respondents alleged in their claims. He further submitted that he has a chance of success in Civil Revision No. 535/17 of

2021 at the Court of Appeal of Tanzania. The applicant went on to submit that in case the court will allow the respondents to execute the contradictory decisions of this court then he will suffer irreparable loss.

On the strength of the above submission, in the interest of justice, the applicant urged to avoid the conflicting decisions of this court, he urged this court to allow the application.

Opposing the application, Ms. Chihoma forcefully contended that the applicant has applied to set aside the decisions of this court; Land Case No. 67 of 2004 vide Civil Application No. 535/17 of 2021 which is on the contrary. She went on to submit that Civil Application No. 535/17 of 20121 is an application for revision against this court decision in Land Review No. 651 of 2021 which rectified errors and omissions that were apparent on the face of the record. She added that it was an application whereas, the applicant tried to pass as an appeal to the decision of this court in Land Case No. 67 of 2004, and the same failed.

To shed a light on the never ending attempts of the applicant to delay justice, Ms. Chihoma cited Order XXXIX Rule 5 (2) of the Civil Procedure Code Cap. 33 [R.E 2019]. She went on to submit that the court which passed the decree may upon sufficient cause order the stay of execution. Ms.

Chihoma contended that the applicant has waited for nearly 8 years for an order for stay of execution from the court's decree in Land Case No. 67 of 2004.

The learned counsel for the respondents continued to argue that the applicant is overturning to mislead the court since the applicant had failed to lodge an appeal on time which lead the Court of Appeal of Tanzania to strike out his notice of appeal four years ago. She added that since the applicant is out of time to file an appeal against the decision in Land Case No. 67 of 2004, this court is precluded from ordering a stay of execution against the decree by virtue of Order XXXIX Rule 5 (2) of the Civil Procedure Code Cap. 33 [R.E 2019].

It was her further submission that in order for this court to grant the application for stay of execution, the applicant must prove to have cumulatively complied with the provisions of Order XXXIX Rule 5 (1) of the Civil Procedure Code Cap.33. She went on to submit that in Land Case No. 67 of 2004, the applicant was declared a trespasser by this court and there is no any order which overturned the decision of this court to date. Thus it was her submission that the applicant stands no chance of suffering any substantial loss since the property in question has never been in his ownership.

Regarding the issue, whether the applicant has made the instant application without unreasonable delay, Ms. Chihoma argued that the applicant slept through time and watched every year goes by while fully aware that there is judgment and decree of this court and he knew the implications against him. The learned counsel for the respondent contended that the applicant had time to countless applications in vain before this court and all the attempts to delay justice. Ms. Chihoma argued that the applicant is not worthy of an order for stay of execution since filing the instant application after the expiration of 8 years from the date of the judgment is far from amounting to a reasonable time.

On another issue of security, whether the applicant has given security for the due performance of such decree or order as may ultimately be binding upon him. Ms. Chihoma contended that the applicant has failed to attach any proof of security for the due performance of this court's decree in Land Case No.67 of 2004 as expressly mandated by the provisions in Order XXXIX Rule 5 (3) (b) of the Civil Procedure Code cap.33. She added that it is their strict submission that the applicant has failed miserably to satisfy the grounds in Order XXXIX Rule 5 (3) (b) of the Civil Procedure Code cap.33 and the instant application lacks merit and the same ought to be struck out. Ms.

Chihoma distinguished the cited case of **Attilo Mbowe** (supra) that this authority befits a party praying for an injunction order and not an order for stay of execution.

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

Having heard the submissions of both learned counsels, I embark on determining the merit of this application. The conditions for the stay of execution are stipulated under Order XXXIX Rule 5 (3), (c) of the Civil Procedure Code Cap.33 [R.E 2019] which states 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 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 anyhow since execution seeks to imprison the applicant.

In my considered view, the applicant has miserably failed to state how he *will suffered any substantial loss and there is no any reasonable cause for his delay to lodge the application for stay of execution.* Taking to account that the decision of this court was delivered in 2004. The reasons stated are not clear at all. As rightly pointed out by Ms. Chihoma, the applicant's submission based on grounds related to prayers of injunction order in the cited case of **Atilio v Mbowe** (supra) is not applicable at all.

In the case of **Felix Emmanuel Mkongwa Andrew Kimwaga**, Civil Application No. 249 of 2016, the Court of Appeal of Tanzania stated that:-

*" The above provisions, we think are self-explanatory and need no further expounding. Suffice only to state that, for an application for stay of execution to be granted under the Rules, the above*



*conditions had to be cumulatively complied with, meaning that in case one of them could have not been satisfied, the court would decline to grant the order for stay of execution. The duty of the applicant to satisfy all the conditions cumulatively has been constantly reiterated by this court in its several decisions."*

See also the cases of **Joseph Anthony Spares @ Goha v Hussein Omary**, Civil Application No. 6 of 2012, and **Laurent Kavishe v Enely @ Hezron**, Civil Application No. 5 of 2012 (both unreported).

Moreover, the applicant has failed to satisfy this court that he has given security for the performance of this court's decree in Land Case No. 67 of 2004 as expressly stated under Order XXXIX Rule 5 (3), (c) of the Civil Procedure Code Cap.33 [R.E 2019] which requires the applicant to show if there was an agreement or equivocal declaration of intention to furnish security for the performance of decree. The same was not even attached to the application. In the case of **FINCA Tanzania v Leonard Andrew Karogo**, Misc. Civil Application No. 52 of 2020, this court dismissed the application for stay of execution after noting that the applicant has failed to furnish security for the due performance of the decree.

It follows therefore that the applicant has abjectly failed to satisfy this court that, the application was filed within a reasonable time; he will suffer substantial loss if the order is not granted, and he has not furnished security for the due performance of the decree sought to be stayed. Therefore, I am in accord with Ms. Chihoma that the applicant has failed to establish the three grounds meriting and order of execution.

From the above analysis, I proceed to dismiss the applicant's application with costs.

Order accordingly.

Dated at Dar es Salaam this 1<sup>st</sup> April, 2022.



  
A.Z.MGEYEKWA

**JUDGE**

01.04.2022

Ruling delivered on this 1<sup>st</sup> April, 2022, in the presence of Ms. Queen Sambo, learned counsel for the respondent.



  
A.Z.MGEYEKWA

**JUDGE**

01.04.2022