

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

**MISC. LAND APPLICATION No.65 OF 2022**

(Arising from Kinondoni District Land and Housing Tribunal in Land Application No. 332 of 2014)

**POLYCARP LAZARO.....APPLICANT**

**VERSUS**

**RASHID KAVIKUTA.....RESPONDENT**

Date of Last Order: 23.03.2022  
Date of Ruling: 23.05.2022

**RULING**

**V.L. MAKANI, J**

The applicant is seeking for an order of stay of execution of the judgment and decree of the District Land and Housing Tribunal for Kinondoni in application No.332 of 2014 dated January,2016. He is also seeking for costs of this application.

The application is made under Order XXXIX Rule 5 (2), (3), Order XXI Rule 24 and section 95 of the Civil Procedure Code, Cap 33 RE 2019 (the **CPC**). The application is supported by the affidavit of the applicant. The respondent filed a counter affidavit in opposition.

It was the court's order that this application be argued by way of written submissions. Mr, Yassin Hassan, Advocate drew and filed submissions on behalf of the applicant. And submissions in reply on behalf of respondent was drawn and filed gratis by Ms. Irene Felix Nambuo, Advocate from Legal and Human Rights Centre.

In support of the application, Mr. Yassin said that the application is presented so that the court can exercise its inherent powers vested on it for grant of stay of execution of decrees from lower courts. He said that three conditions must be met for the court to grant an order of stay of execution. That according to Order XXXIX Rule 5 (3) of the CPC the Court must satisfy that (a) the substantial loss that may result to 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 the security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

On the first condition Mr.Yassin said that the order of eviction is made against his own premises where he lives and he has no power to

move to another place as his age and financial ability does not support him. That eviction will render his family homeless. That the amount of loss cannot be quantified. He relied on the case of **Tropical Commodities Supplies Ltd & 2 Others vs International Credit Bank Ltd (In Liquidation) (2004) EA 331** where he said it was held that the phrase substantial loss does not represent any particular amount or size, it cannot be quantified by any particular mathematical formula.

On the second condition Counsel said that it is upon court's discretion for the applicant to furnish security for the due performance of the decree. He argued the court to apply its discretion for grant of the order of stay of execution for a reasonable condition which will be accorded, and which will be just to the respondent in order for the applicant to get justice. He relied on the case of **Mantrac Tanzania Ltd vs Raymond Costa, Civil Application No. 491/17 of 2019** (unreported)

On the third ground he said that the application has been brought without unreasonable delay which is 14 days. He said that the applicant was not duly served with the summons as the law requires

therefore, he was not aware of the application filed by respondent for execution in the Tribunal. That the summons from the Tribunal was delivered to the Street Chairman who dumped it to the spouse of the applicant as seen in the attached copy of summons. That summons is not even sworn or affirmed for proof of service before trial Tribunal. That the applicant could in no way know the existence of the said application for execution at the Tribunal as the summons was improperly served. He said Rule 6 (1) (4) (b) of Land Disputes Courts (District Land and Housing Tribunal) GN No.174 requires that the person who affects the service to swear and affirm the affidavit in the prescribed form indicating the manner in which the service has been affected. He therefore insisted that the present application has been filed without delay. Counsel prayed for the application to be granted.

In reply, Ms. Nambuo said that, the applicant has not satisfied the requirements for grant of stay of execution as stipulated in the case of **Tanzania Electric Supply Company (TANESCO) vs. Independent Power Tanzania Limited (IPTL) & Two Others, [2000] TLR 324**, where the conditions stated were: (a) whether the appeal has likelihood of success, (b) whether its refusal is likely to

cause substantial and irreparable injury to the applicant, (c) balance of convenience.

Ms. Nambuo said the applicant has not stated the existence of an appeal with prima facie chances of success in the Court of Appeal. She said the records shows that there was a Civil Appeal No.72 of 2013 which was struck out for being incompetent and there is nothing pending to stay the execution at the Tribunal. She further said that the applicant has failed to prove that he will suffer irreparable injury if the application will not be granted. Counsel argued that it is the respondent who stands to suffer as he has been barred from executing his decree since 2011 after this court upheld the decision of Ward Tribunal declaring the respondent lawful owner of the disputed land in Land Appeal No.160 of 2009. Counsel listed a number of cases filed by the applicant in different courts which she said was aiming at preventing the respondent from executing the decision of the Ward Tribunal. She insisted that the applicant has failed to establish that he will irreparably suffer in case the application is not granted. Counsel relied on the case of **Albert Braganza and another vs. Mrs. Flora Lourdin Braganza [1992] TLR 307 (CAT)**

On the balance of convenience, she said that the court has to see who will suffer more in case the application is refused. On this point she said, the applicant has only stated that he was not properly served. While he knew of the process and has been intervening the execution. Counsel insisted that if the application would be granted, the respondent stands to lose in that it is more than a decade the applicant is enjoying the fruits of the suit property while he is not the lawful owner of the suit property. She pointed out that the applicant has also failed to show as to how he stands to suffer irreparable loss in case the application is denied as he is currently occupying the suit property despite eviction order by the Tribunal. Counsel prayed for the application to be dismissed with costs.

Having gone through affidavits and submissions from the parties, the issue for determination is whether this application has merits.

It is settled law that, for an application for stay of execution to stand, the applicant must cumulatively prove that:

- (a) *Whether the appeal or application has prima facie likelihood of success.*

(b) *Whether the refusal of staying execution is likely to cause substantial and irreparable injury to the applicant.*

(c) *Balance of convenience.*

(I subscribe to the case of **TANESCO** (supra) and also see the **Magnet Construction Ltd vs. Bruce Wallace Jones, Labour Execution No. 11 of 2020 (HC-Musoma)** (unreported).

As correctly stated by Ms. Nambuo, Counsel for the applicant has not proved all the three conditions required for the grant of an application for stay of execution. In his submissions, Mr. Yassin has generally stated that the applicant and his family will be rendered homeless in case the application is not stayed as he is of old age with no financial capacity to move to another place. But he has not stated if there is any pending case in court of law in relation to the suit property. Pending of a case is the condition precedent for grant of an application for stay in that the court would issue an order for stay pending say an appeal or any other matter. In the case of **Rwechungura Idd vs. Fulaison Flansi, Land Case Appeal No. 44 of 2016 (HC-Bukoba)** (unreported) it was stated:

*"It is the cardinal principle of law that a stay of execution application being an interim order to maintain the status quo pending determination of it,*

*has to hinge on a pending matter. In the present matter, the stay of execution was hinged on the application for revision which was withdrawn. In this regard therefore there is nothing pending to make the stay of execution order to go on subsisting."*

In this present case, as already stated above, there is no proof that there is an appeal or any other application pending in court. In that respect therefore, there is nothing to sustain an order for stay of execution. Further, Mr. Yassin has dealt so much on the point that the matter has been brought promptly to the court without considering the other points in detail which have to be dealt with cumulatively as set out in the cases cited above.

In view thereof the application at hand lacks merit and is hereby dismissed with costs.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**23/05/2022**

