

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

MISC. LAND APPLICATION NO. 600 OF 2021

(Arising from Land Case No. 381 of 2017)

S.M. SAEED LIMITED APPLICANT

VERSUS

CORPORATE SECURITY LTD 1ST RESPONDENT

MRS. PARVIZ AZAD POONJA BHANJI 2ND RESPONDENT

EQUITY BANK TANZANIA LTD 3RD RESPONDENT

RULING


Date of Last Order: 17/12/2021

Date of Ruling: 23/02/2022

A. MSAFIRI, J

In this application, the applicant S.M. Saeed Limited, is moving this Court for the following Orders;

- a) That this Honourable Court may be pleased to issue an order staying the execution of the decree.
- b) Costs of the application.
- c) Any other relief(s) this Honourable Court deem just (sic) to grant.

The application was brought under Order XXXIX Rule 5(1) of the Civil Procedure Code, Cap 33 R.E. 2019 and was supported by an affidavit of Mohamed Ally Ahmed, the Principal Officer of the applicant. 

Opposing the application, the respondents filed their counter affidavits. The 3rd respondent, Equity Bank Tanzania Limited went further and filed a Notice of Preliminary Objection to the effect that;

1. This Hon. Court has no jurisdiction to entertain this application because there is already filed a Notice of Intention to Appeal at the Court of Appeal of Tanzania.
2. This application is improper before this Court as there is no executable decree on the respondents to be stayed.

The preliminary objection was heard viva voce whereby Mr. Kimario advocate represented the 3rd respondent. Submitting in support of the preliminary objection, he started by submitting on the first point that this Court has no jurisdiction to entertain this application. He said that, in paragraph 4 of the affidavit of Mohamed Ally Ahmed, the principal officer of the applicant, it states that the applicant has already filed a Notice of appeal to the Court of Appeal with an intention to appeal against the decision of this court in Land Case No. 381 of 2017. That the copy of the said Notice is attached to the said affidavit of the applicant, and that it proves the existence of an appeal in the Court of Appeal.

Mr. Kimario argued that, it is a settled law that once a Notice of appeal is lodged to the Court of Appeal, this court ceases to have jurisdiction on the matter. To cement his arguments, he cited the cases of **Serenity on the Lake Ltd. vs. Dorcas Martin Nyanda**, Civil Revision No. 1 of 2019, CAT at Mwanza (unreported) and **Aero Helicopter (T) Ltd vs. F.N. Jansen**, TLR (1990) 142. *Adls-*

On the second point of objection, Mr. Kimario submitted that this application is improper as there is no executable decree to be stayed. He stated that at paragraph 10 of the applicant's affidavit, it is admitted that the 3rd respondent has not yet lodged an application for execution. That as there is no application for execution, this application is premature as there is nothing to be stayed in this Court as there is no executable Order. He prayed that this application be struck out with costs.

Opposing the preliminary objection, Mr. Samwel Shadrack, Advocate, representing the applicant submitted on the first point of objection that, it is true that there is a Notice of Appeal lodged to the Court of Appeal challenging the decision in Land Case No. 381 of 2017. That the Notice of Appeal is clear that the appeal intends to challenge the whole decision on the said case and not the order.

That, they were not satisfied by the decision of the court in Land Case No. 381 of 2017 which declared that the mortgage was legal. He stated that, the 3rd respondent has initiated illegal execution by engaging Locus Debt Management Ltd to evict the applicant from the suit house while being aware that there is a Notice of Appeal challenging the whole decision. That the applicant has no option other than filing the stay of execution seeking justice before this Court.

Submitting on the second objection, Mr. Shadrack stated that this point of objection does not qualify to be a point of law as per the **case of Mukisa Biscuits vs. West End** as it needs scrutiny of evidence.

Aelle

He argued that the 3rd respondent is inviting the Court to go through the judgment and automatically this becomes a point of fact which disqualifies the preliminary objection. He prayed that the preliminary objection be overruled.

In rejoinder, Mr. Kimario reiterated his submissions in chief, he added that, even if there was an order of Execution, as long as there is already a Notice of appeal to the Court of appeal, the application for stay of execution should have been filed to the Court of Appeal and not this Court.

I have gone through the pleadings filed by the parties, and the submissions made for and against the objections. I have also read the authorities cited in support of the arguments made by the parties. Upon such exercise, the question for my determination is whether the preliminary objections are meritorious.

The test on the merit of the above objections is to be found in the famous case of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Ltd** (1969) EA 696 at page 200 where it was observed that;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation"

Alle

*the decree or order; but the Court, **may upon good cause shown, order stay of execution of such decree or order. (Emphasis mine)***

From this, with respect, I differ with the arguments by Mr. Shadrack, because under Rule 11 of the Court of Appeal Rules, the applicant can still file his application for stay of execution and upon satisfying the Court that there is a good cause, the Court may grant the application.

Consequently, since there is an appeal pending before the Court of Appeal which has been instituted by the Notice of Appeal, this Court has no jurisdiction to hear this application.

For this reason, I sustain the first point of preliminary objection. Since this point has raised a matter of jurisdiction which dispose of the case, I need not go into determination of the second point of preliminary objection.

I hereby struck out the application with costs.

It is so ordered.

Dated at Dar es Salaam this 23rd day of February 2022.





A. MSAFIRI
JUDGE