

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 135 OF 2023

(Arising from Land Case No. 354 of 2016)

HAMISI MWINYI.....APPLICANT

VERSUS

AISHA AKBAR CHOPRA.....RESPONDENT

RULING

8th & 12th May 2023

L.HEMED, J.

The Applicant herein, **HAMISI MWINYI** together with someone **SAUDA SELEMANI** lost in Land Case No. 354 of 2016 against the Respondent herein **AISHA AKBAR CHOPRA**. They were ordered to vacate from the premises located on **Plot No.53, Block 17 located at Mwinyimkuu, Magomeni Dar es Salaam**, which was found to be the property of the Respondent herein.

Following her triumph in the aforesaid Land Case, the Decree Holder who is the respondent in this matter successfully applied for execution of the Decree in Execution No.32 of 2022. Execution was assigned to Mr. Joshua E.Mwaituka , t/a Fosters & Companies Limited to evict the Applicant from

the premises and remove all their alterations that were made in the disputed premises.

On 16th March 2023 the applicant lodged the instant application under Order XXI Rule 27 and section 95 of the Civil Procedure Code, [Cap 33 RE 2019] seeking for orders:-

" (1) That execution of the Order of the High Court of Tanzania in Land Case No.354 of 20116 (sic) dated 30th day of July,2021 and eviction order delivered to the parties on 14th day of February,2023 be stayed pending determination of the application for extension of time.

(2) Costs of this application be in the course; and

(3) Any other relief as the court may deem fit and just..."

During hearing of the application which was held on 8th May 2023, parties appeared and argued for and/or against the application in person. The Applicant asserted that the Court should grant the application for stay of execution because he is in the process to appeal against the Judgment and Decree in Land Case No.354 of 2016. He submitted to be awaiting the completion of this application so that he may process the appeal.

On her part, the respondent disputed grant of the application on the ground that the applicant had applied for extension of time to file notice of appeal through Misc. Land Case No.704 of 2021, but the same ended up being dismissed on 11th May, 2022. He also attempted through Misc. Land Case No.454 of 2021, to apply for extension of time to appeal to the Court of Appeal in vain. The said Application was dismissed on 23/02/2023. She prayed the Court to dismiss the application.

In his short rejoinder submissions, the applicant conceded to have lodged an application for extension of time to appeal to the Court of Appeal of Tanzania but the same ended up being dismissed. He stated not to be aware of his application before Hon. Msafiri, J. to have been dismissed.

Having heard the submissions from both parties, let me now determine as to whether the application at hand is meritorious. This is an application for stay of execution. The condition for determining application like the one at hand are provided under Order XXXIX Rule 5(3) of the Civil Procedure Code, [Cap.33 R.E.2019] thus: -

"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 that-

- (a) *That substantial loss 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 security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."*

From the above provisions, the applicant in applications for stay of execution like the one at hand has to establish that if stay of execution has not been made he will (1) **suffer substantial loss**; the application for stay of execution (2) **has been made without unreasonable delay**; and the applicant has given (3) **security for the due performance** of the decree. Starting with the first condition, the applicant in the matter at hand has not stated either in his affidavit that supports the application or in his submissions as to what loss he will suffer if the order to stay execution is not granted. The applicant ought to have made clear on what loss is likely to occur against him if the execution is not stayed.

As to the second condition whether the application has been made without unreasonable delay, I have noted that the application for stay of

execution was filed herein this Court on 14th March 2023. The application for execution was granted on 15th day of September, 2022. On the 14th day of February 2023, Fosters & Companies Limited was assigned the task of evicting the applicant from the suit premises.

According to the Order of assignment, the Court Broker was commanded to return the warrant on before 14th March 2023 showing the manner in which the Order had been executed. Records of the matter at hand show clearly that it was lodged on the day the Report of the Court Broker was returned. In other words, the application at hand was filed after the application for execution had been granted and probably executed. It is my firm view that, the applicant unreasonably delayed in filing the present application.

Regarding furnishing security for due performance of the decree, nothing has been pledged by the applicant. In the absence of such security pledged by the Judgment debtor we have to draw inference against the applicant that the application for stay of execution has been filed intending to delay and circumvent execution of the decree in Land Case No. 354 of 2016. This Court is not prepared to succumb to that ill motive.

The reason given by the applicant while arguing for the application, was that he is processing appeal to the Court of Appeal against the Judgment and Decree of this Court in Land Case No.354 of 2016. In his submissions he also confessed that there is no pending appeal in the Court of Appeal. I do subscribe to the position stated in **Jawinga Co.Ltd v. Elistepro Investment Co.Ltd**, Commercial Case No. 103 of 2012 (unreported) that the pendency of an appeal or notice of intention to appeal does not automatically operate as stay of execution. Besides, in the present case, there is no pending appeal in the Court of Appeal against the Judgment and Decree subject for execution.

I have also noted that in 2021, the applicant instituted Misc. Land Case Application No.704 of 2021 seeking for extension of time within which to file Notice of appeal against the decision of this Court in Land Case No.354 of 2016. The applicant failed to prosecute the same hence it was dismissed on 11th day of May 2022.

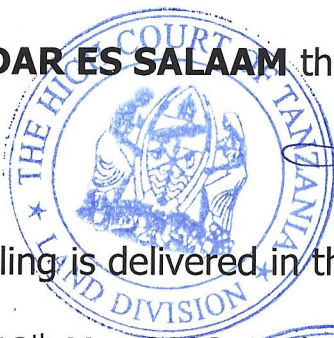
The applicant never got tired he filed another application seeking for extension of time to file an application for leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania in

Misc. Land Application No.704 of 2021 by Hon. B.S. Masoud, J. However, the same got dismissed on 15th December 2022 by Hon A. Msafiri, J.

The dismissal of the aforesaid two applications implies that the doors to appeal against the Judgment and Decree of this Court in Land Case No.354 of 2016 are closed. The two decisions of this Court in Misc. Land Application No. 704 of 2021 (Hon. Masoud, J.) and in Misc. Land Case Application No.454 of 2022 (Hon. Msafiri, J.) unequivocally show that the applicant has nothing substantial pending in Court to warrant stay of execution.

From the foregoing, the application for stay of execution falls short of merits. It deserves dismissal. I do hereby dismiss the entire application with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 12th May 2023.




L. HEMED
JUDGE

COURT: Ruling is delivered in the presence of both parties appearing in person this 12th May 2023. Right of appeal fully explained.




L. HEMED
JUDGE