

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 486 OF 2023

(Originating from Execution No.39 of 2023 Between Abdulhamid Mustafa Sheikh (Decree Holder) vs Mohamed Iqbal(Judgment Debtor)

MOHAMED IQBAL..... APPLICANT

VERSUS

ABDULHAMID MUSTAFA SHEIKH.....RESPONDENT

RULING

31st August, 2023 & 5th October 2023

L. HEMED, J.

In this application, the applicant is seeking for stay of execution proceedings in Execution No.39 of 2023. The background of this matter is such that, on 03rd February, 2016 this Court (Mgetta,J) pronounced a judgment in Land Case No.126 of 2007 in which the suit filed by **Mohamed Iqbal** (the applicant herein) got dismissed and the counter claim thereof, lodged by **Abdulhamid Mustafa Sheikh** (Respondent herein) was granted. The Applicant was aggrieved by the said decision and lodged in the Court of Appeal a Civil Appeal No.121 of 2017 which ended up being struck out on 16th June 2022 for being time barred.

The applicant lodged in this Court Misc. Land Application No.371 of 2022 seeking extension of time to file Notice of Appeal as a second attempt to challenge the said Judgment in Land Case No.126 of 2007. However, the said application was dismissed on 17th November, 2022 for lack of merits. The dismissal of the said application prompted the applicant herein to file in the Court of Appeal, Civil Application No.219/17 of 2023 seeking a second bite on extension of time to file Notice of Appeal. The said application in the Court of Appeal has not yet ended.

Vide this application; the Applicant is seeking this Court to stay execution of the decree pending final determination of Civil Application No.219/17 of 2023 by the Court of Appeal of Tanzania. The application has been made under **section 3A (1) and (2) and section 95 and Order XXI, Rule 24(1) and Rule 27 of the Civil Procedure Code, [Cap.33 R.E 2019]**. It was taken at the instance of LEO ATTORNEYS and supported by the Affidavit of MOHAMED IQBAL and YUSTA PETER KIBUGA.

The respondent herein challenged the application through the counter affidavits of **WAHIDI FAUZI SEFU**. Alongside the counter

affidavits, the respondent raised the preliminary objection on the following points:-

"1. The Honourable Court has no jurisdiction to entertain the present application for stay of execution of its decree pending the hearing and determination of the Civil Application No.219/17 of 2023 lodged in the Court of Appeal of Tanzania.

2. The application is an abuse of the process of the court."

When the matter was called for necessary orders on 31st August 2023, it was directed that both the preliminary objection and the application be argued together by way of written submissions. This ruling consolidates the preliminary objection and the application. Parties promptly complied with the scheduling order. In arguing the preliminary objection and the application, the respondent was represented by **Mr. Daimu Halfani**, learned advocate, while the applicant enjoyed the legal service of **Mr. Boaz Zephania**, learned advocate.

I have opted to begin with the preliminary objection. The reason for so doing is obvious, that once the court is encountered with the preliminary objection, it has to dispose it first, before embarking into determining the merits of the matter before it.

I have read exhaustively the rival submissions filed by the parties. In his submissions, the respondent opted to abandon the 2nd limb of objection, which was on the application being in abuse of court process. He only concentrated to argue on the 1st limb which was on want of jurisdiction of this court to entertain the instantaneous application for stay of execution.

The arguments of the counsel for the respondent in regard to the objection was such that, sections 3A(1) and (2), 95 and Order XXI Rule 24(1) & 27 of the Civil Procedure Code, cited by the applicant, does not confer this court jurisdiction to entertain the present application for stay of execution of its decree pending the hearing and determination of the Civil Application No.219/17 of 2023 lodged and pending in the Court of Appeal of Tanzania. He substantiated his argument by citing the decision in the

case of **Petro Robert Myavilwa vs Rahim Mchalikwao**, Misc. Land Application No.21 of 2020.

It was asserted by Mr. Daimu that section 3A (1) and (2) of the Civil Procedure Code, does not confer this court the jurisdiction which it does not have under the law. In his view, section 3A provides for the overriding objective of the Civil Procedure Code which is intended to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Civil Procedure Code. To this point, he cited the decision in **Vinos vs Marks & Spencer Plc**[2000]EWCA Civ B526 [2001]3 All ER 784, that overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. He was finally of the view that the application for stay of execution be stuck out on the ground that the court has no jurisdiction.

In reply to Mr. Zephania, advocate contended that jurisdiction is a creature of statute as such it cannot be assumed or exercised on the basis of likes and dislikes of the parties. He added that for the court to have jurisdiction to entertain any matter, there must be clear and specific

provision of law conferring that particular court with jurisdiction. In the absence of express provision of law, the court cannot assume jurisdiction because it is risky and unsafe. To support his argument he cited the case of **Commissioner General of Tanzania Revenue Authority vs JSC Atomredmetzoloto(ARMZ)**, Consolidated Civil Appeal Nos.78 and 79 of 2018 (CAT).

The applicant's advocate submitted that the application at hand has been brought under the provision of section 3A (1) and (2), 95 and Order XXI rule 24(1) and 27 of the Civil Procedure Code, [Cap.33 RE 2019] seeking for an order to stay of execution No.39 of 2023. In his view, the court has been properly moved and it has jurisdiction to grant the prayer sought because the provisions cited are relevant to the circumstance at hand.

It was stated that in **Juma Hassan Mohamed vs Tabu Ally Ngalanda**, Misc. Land Application No. 743 of 2020, the Court was moved under the provision of Order XXI Rule 27 of the Civil Procedure Code, Cap 33 to determine application for stay of execution whereby the court determined the merits of application for stay of execution. However, the

application was not meritorious. He asseverated that there is no any express provision in the Court of Appeal Rules which can be used to move the Court of Appeal to order stay of execution pending hearing and determination of application for extension of time to file notice of appeal. He was of the view that this court has jurisdiction to entertain the application at hand. He cited the case of **AERO Helicopter (T) Limited vs FN Jansen** (1990) TLR 142, that the High Court has jurisdiction to entertain application for stay of execution so long as no proceedings of appeal to the Court of Appeal have commenced. He prayed for the preliminary objection to be overruled.

In his rejoinder, the counsel for the applicant reiterated his submissions in chief by stating that, when the proceedings have commenced in the Court of Appeal the High Court ceases to have jurisdiction to entertain application for stay of execution. A Notice initiates the proceedings in the Court of Appeal. He referred the court to the decision of this Court in **Pendo Fluegence Nkwenge vs Dr. Wahida Shangali**, Msc. Land Application No.51 of 2020 where it was stated that, while appeals in the Court of Appeal are initiated by Notice of Appeal, the applications are initiated by a Notice of Motion. It was also observed in the

said case that when there is a pending matter in the Court of Appeal consequently the High Court's jurisdiction ceases as the two courts do not have concurrent jurisdiction. According to the respondent's counsel, the Court of Appeal in the case of **Tanzania Electric Supply Company Limited vs Dowans Holdings (Costa Rica) & Another**, Civil Application No. 142 of 2012, supported the position.

Having profoundly gone through the rival submissions, it is pertinent to determine whether the preliminary objection has merits. The learned counsel for the respondent started by arguing that the enabling provision of the present application does not confer jurisdiction to the court to determine it. The applicant cited sections 3A (1) & (2),⁹⁵ and Order XXI Rule 24(1) and Rule 27 of the Civil Procedure Code, [Cap.33 R.E 2019] as enabling provisions for his application. Section 3A (1) & (2) of the CPC readth:-

"3A.-(1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1)."

The above quoted provision provides for the overriding objectives in the application of rules of procedure. The said section 3A of the CPC does not confer the court jurisdiction which does not have under the law. I do subscribe to the position held in **Martin D. Kumaliya & Others vs Iron & Steel Ltd**, Civil Application No. 70 of 2018 that the overriding objective principle was introduced to facilitate the just, expeditious, proportionate and affordable resolution of dispute. The principle under section 3A of the CPC is a vehicle for attainment of substantive justice but it does not confer jurisdiction which the court does not have. In the present case, it is obvious that the section does not confer jurisdiction to this court to entertain the application at hand.

Another enabling provision in his application is section 95 of the CPC, which reads:

"95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

In **AERO Helicopter(T) Ltd v. F.N. Jansen** (CAT) [1990] T.L.R. 142 the Court of Appeal of Tanzania determined the question as to whether section 95 of the Civil Procedure Code confer jurisdiction on the High Court to order stay of execution pending appeal to the Court of Appeal. It observed that once proceedings of appeal to the Court of Appeal of Tanzania have been commenced the High Court cannot properly apply section 95 of the Code for the simple reason that the proceedings are no longer in the court. Apart from the fact that there is no pending proceedings in this Court, I am also of the firm view that section 95 of the Code provides for the general power of the court in controlling proceeding and to prevent abuse of the court process. The section does not give jurisdiction which the court does not have. It only provides for the inherent powers of the court in the exercise of jurisdiction, which already conferred to it.

The applicant also cited Order XXI Rule 24(1) and 27 of the CPC which is hereunder quoted verbatim as follows: -

"24.-(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto.

27. 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 security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided."

It is not in dispute that there is pending Civil Application No.219/17 of 2023 in the Court of Appeal seeking for extension of time to file Notice of Appeal. In view of such pending application for extension of time, the question for determination is on whether this court clothed with jurisdiction to grant the prayers sought in the instant application. The applicant asserted that Order XXI Rule 24 and 27 of the Civil Procedure Code, [Cap.33 R.E 2019] was the correct provision and that this court has jurisdiction. I am of the firm view that the provisions are also incorrect, as they do not confer jurisdiction to this court where a notice of appeal or revision has already been filed in the Court of Appeal. I am holding so based on the decision of the Court of Appeal in **Tanzania Electric Supply Company Limited vs Dowans Holdings (Costa Rica) & Another**, Civil Application No. 142 of 2012, where it was stated thus: -

"The High Court and/or Tribunals had actually their inherent jurisdiction to grant orders of stay of

*execution pending appeal saved under section 95 of the Civil Procedure Code, Cap.33. This, **however,** **has always been subject to one condition that no proceedings in the matter have been commenced in this Court.**”(Emphasis Added)*

It is without doubts that before the Court of Appeal of Tanzania, the Applicant herein has already filed a **Notice of Motion** seeking for extension of time to appeal. The Notice of Motion signifies the intention of the applicant to prosecute an application at the Court of Appeal. The Notice of Motion in the Court of Appeal in respect of Civil Application No.219/17 of 2023 establishes the intention of the Applicant to prosecute a case at the Court of Appeal. The fact that this court has been informed as to the pending Civil Application No.219/17 of 2023 in the Court of Appeal, the principle laid down in **AERO Helicopter (T) Limited vs FN Jansen** (supra), applies squarely in this matter that, the High Court jurisdiction ceases.

In the final analysis, I find the objection to have merits. I therefore find no need of making assessment to the submissions in respect to the

application. I do hereby dismiss the entire application with costs. It is so ordered.

DATED at DAR ES SALAAM this 5th October, 2023



L. Hemed

L. HEMED

JUDGE