

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 519 OF 2023

(Originating from Execution No. 36 of 2023)

ALEX MSAMA MWITA..... APPLICANT

VERSUS

HUSSEIN MWINYI MPETA.....1ST RESPONDENT

**MUGITUTI MATIKO trading as ACTAS SECONDARY
SCHOOL.....2ND RESPONDENT**

WILLIAMSONS GARMENTS LIMITED.....3RD RESPONDENT

RULING

20th September 2023 & 25th October, 2023

L. HEMED, J.

ALEX MSAMA MWITA, the Applicant herein brought the instantaneous Application under Order XXXIX Rule 5(1) and (2) and section 95 of the Civil Procedure Code, [Cap 33 RE 2019] seeking for the following orders against the respondents:-

" (a) That this Honourable Court may be pleased to stay the execution of the Eviction Order, demolition order and any payment if any in respect of property

which situated at Plot No.29 Mbezi Industrial Area Kinondoni Dar es Salaam Tanzania with CT No.37247 pending finalization of Civil Application No. 299/17 of 2022 pending before to the Court of Appeal of Tanzania sitting at Dar es Salaam” (sic)

(b) Costs of this application be provided for

(c) Any other relief(s) and directions as this Honourable Court may deem necessary to grant in the interest of justice.”

Only the 3rd Respondent, **WILLIAMSONS GARMENTS LIMITED**, who has been appearing in court through the service of Mr. Kassim Nyangarika, learned advocate. The other respondents, **HUSSEIN MWINYI MPETA** and **MUGITUTI MATIKO** trading as **ACTAS SECONDARY SCHOOL**, the 1st and 2nd defendants respectively, have neither been appearing nor they have filed their counter affidavits.

When I was perusing the case file, I noticed the presence of a Counter Affidavit deponed by one **BHAVIN JAYANTILAL BORKHATARIA**. The deponent of the said counter affidavit is not a party to the application and in his/her deposition nothing has been said as to whom among the respondents the counter affidavit is related to. If at all

the deponent is related to the 3rd respondent, I expected the counter affidavit to have stated that the deponent is the principal officer of the 3rd respondent or otherwise. At this juncture, I think, I need to reserve my further comments on the said counter affidavit for it will be discussed in details when determining the application on merits if at all it survives the preliminary objection raised by the 3rd Respondent.

The Notice of Preliminary objection had the following points:-

"a) This Honourable Court is not clothed with jurisdiction to entertain and determine the application above under the cited laws as the applicant had filed an application in Tanzania Court of Appeal which is registered as Civil Application No. 299/17 of 2022. (sic)

b) This Honourable Court has no Jurisdiction to entertain and determine the above application under the provisions of SECTIONS 3 AND 4(3) OF THE APPELLATE JURISDICTION ACT, CAP 141 R.E 2019 and RULE 11(3) OF THE TANZANIA COURT OF APPEAL RULES, RE.2019 (sic)

c) That paragraphs 3,7,8,9 and 10 of the affidavit of Alex Msama Mwita filed in support of the above

application contains extraneous matter by way of Legal Opinion and arguments, prayers, hearsay evidence and conclusions contrary to the provisions of ORDER XIX RULE 3 (1) OF THE CIVIL PROCEDURE, CODE, CAP 33 RE, 2019. (sic)"

When the matter was called on 20th September, 2023 among other orders, the Court directed the preliminary objection to be argued by way of written submissions. Mr. **Kassim Nyangarika**, learned advocate acted for the 3rd defendant while the applicant enjoyed the service of Mr. **Augustine Kusalika**, learned advocate. Parties complied with the scheduling order as they promptly filed their submissions.

I have opted to begin with the 1st limb of preliminary objection on the jurisdiction of this court to determine the matter at hand. As pointed out earlier, this matter has been preferred, under Order XXXIX Rule 5(1) and (2) of the Civil Procedure, [Cap.33 R.E 2019]. The said provisions state as follows:

"5.-(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Court may order, nor shall execution of a decree be

stayed by reason only of an appeal having been preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may, on sufficient cause shown, order the execution to be stayed."

Before I embark to determine the merits of the 1st limb of the preliminary objection, let me briefly give the background pertaining to the matter at hand. In 2008, the 3rd Respondent herein instituted in this Court, Land Case No.178 of 2008 against the 2nd Respondent for recovery of the land, Plot No. 29 Mbezi Industrial Area, Kinondoni - Dar es Salaam. The said matter ended by DECREE ON SETTLEMENT between WILLIAMSON GARMENTS LTD (the 3rd respondent herein) and MUGITUTI MATIKO t/a ACTAS H.SCHOOL (the 2nd respondent herein) with the following orders:-

"1. The Defendant shall pay to the Plaintiff, in final settlement of the present suit, shillings

950,000,000/=(shillings nine hundred fifty million) in the following manner;

- (i) Shilling 50,000,000/= (shillings fifty million) on or before the 30th day of April, 2013;*
- (ii) Shillings 50,000,000/= (shillings fifty million) at the end of may,2013)*
- (iii) Shillings 50,000,000/=(shillings fifty million) at the end of June, 2013;*
- (iv) Shillings 800,000,000/=(shillings eight hundred million) at the end of July,2013;*

2. Payments shall be by way of telegraphic transfer (TT) to the Bank account of WILLIAMSON GARMENTS LTD, THE Plaintiff herein.

3. The parties hereto shall execute a deed of transfer of the suit premises when the final instalment of shillings 800,000,000/= (shillings eight hundred million) is paid by the Defendant to the Plaintiff.

4. The Plaintiff, through its Advocates, shall release to the Defendant, the Certificate of Occupancy, CT No.37247, the deed of transfer as well as fully completed Forms 29 and 30 under the Land (Forms) Regulations, 2001, GN.No.71 published on 4/5/2001 when the full amount of shillings 950,000,000/=(shillings nine hundred fifty million) is paid by the Defendant to the Plaintiff.

5. Meanwhile the Plaintiff or its agents shall not interfere with the Defendant's occupation of the suit premises.

6. The usual default clause to follow.

7. No order as to costs."

The Applicant herein, who was not a party to the above Decree, instituted another suit in this court on the same suit property. The said suit was registered as Land Case No. 175 of 2021; however, the same ended up being dismissed on 6th day of April 2022 for being *res judicata* to Land Case No.178 of 2008. The Applicant having aggrieved by the dismissal of Land Case No.175 of 2021 he preferred an application for revision in the Court of Appeal of Tanzania, *vide* Civil Application No.299/17 of 2022, which is still pending.

The basis of the objection on the jurisdiction of this court as raised by the learned counsel for the 3rd respondent is on the pendency of the aforesaid Civil Application No.299/17 of 2022 in the Court of Appeal of Tanzania against the dismissal order of this Court in Land Case No.175 of 2021. It was the argument of the 3rd respondent's counsel that this court is not seized with jurisdiction to determine an application for stay of execution pending revision filed in the Court of Appeal under the cited

provision. In his opinion, once the matter is in the Court of Appeal, this Court ceases to have jurisdiction over the matter. In fortifying his arguments, he cited the decision of the Court of Appeal of Tanzania in **Mekefa Son Madalao & 8 others vs The Registered Trustees of the Archdiocese of Dar es Salaam**, Civil Application No.491/17 of 2019. In the said case, the Court observed that applications for stay of execution pending revision in the Court of Appeal, may be under Rule 4(2)(a) and (b) of the Court of Appeal Rules, 2009. In the view of the 3rd respondent, in the circumstance of this case, only the Court of Appeal of Tanzania which has jurisdiction to entertain the application for stay of execution.

In reply thereof, the counsel for the applicant contended that the application at hand is proper and this court has jurisdiction to determine it. According to the learned counsel for the applicant, the Court of Appeal Rules do not have specific provision governing application for stay pending application for revision in the Court of Appeal. He was of the view that, only this Court which has such powers to deal with application for stay when there is a pending application for Revision in the Court of Appeal of Tanzania.

Having gone through the submissions made by the learned counsel, the question is whether this court is vested with jurisdiction to grant stay of execution under Order XXXIX Rule 5(1) & (2) of the Civil Procedure Code, [Cap 33 RE 2019]. This question can be answered by determining the scope of application of the said provision. In the first place, application for stay under the cited provision can be preferred to this Court when there is an appeal from the subordinate courts. The provision does not refer to applications for revision. In view of section 2 of the Civil Procedure Code (supra), the provisions in the Code, apply only to the proceedings in the High Court, Courts of Resident Magistrates and the District Courts. The way the provision has been couched, it refers to the applications for stay of execution referring to appeals from subordinate courts. Since there is no pending appeal and the fact that the cited provision do not apply to revision and proceedings from the High Court to the Court of appeal, this court has no jurisdiction to grant the prayers sought under the cited enabling provision.

Additionally, as aforesaid, the Applicant herein was and is still not a party to the DECREE ON SETTLEMENT in Land Case No.178 of 2008. The applicant herein has never challenged it. The application which is pending

in the Court of Appeal, that is, Civil Application No.299/17 of 2022 does not concern the Decree on Settlement in Land Case No. 178 of 2008, rather it concerns with the dismissal order in Land Case No.175 of 2021. This is evident from paragraphs 5 and 6 of the Affidavit supporting the application which states thus:-

"5. That following the afore stated preliminary objection on 10th March 2022 this Honourable Court which presided by Honourable Judge Msafiri ordered the preliminary objections be disposed by way of written submissions and 6th April 2022 the Trial Court dismissed the suit Land Case No. 175 of 2021 on the ground that the same was Res judicata to Land Case No. 178 of 2008 thus was not clothed with jurisdiction thereto.

6. That following the afore stated dismissal order on 3rd June 2022 the Applicant herein lodged to the Court of Appeal of Tanzania challenging dismissal order which was made on 10th March 2022 and Application was admitted as Civil Application No.299/17 of 2022..."

The above quoted paragraphs unequivocally show that the Decree on Settlement is not subject to the application which is pending in the

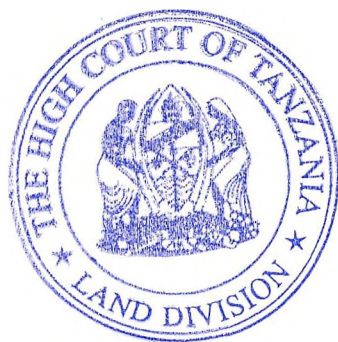
Court of Appeal of Tanzania. The fact that the applicant has nothing so far pending in court to challenge the Decree on Settlement, the applicant remains a stranger to the said decree. This court therefore, cannot have jurisdiction to grant stay of execution to the stranger in the Decree.


In the affidavit to support the application, I have also seen an execution Order by eviction dated 29th day of November 2013. The said EVICTION ORDERS was assigned to LEONARD KAALE t/a RHINO AUCTION MART AND COURT BROKERS in execution of the DECREE ON SETTLEMENT made in Land Case No.178 of 2008. The said eviction orders implies that application for execution of the said DECREE ON SETTLEMENT was determined in the year 2013 and granted. The question is, can this court cloth itself with jurisdiction to stay execution, which was granted in the year 2013. The answer is straightforward that, this court cannot stay something that does not exists. The application for stay of execution has been overtaken by events.

From the foregoing, I find merits in the objection on jurisdiction of this Court. Having found so, I do not see the need of canvassing the remaining limb of objection as for so doing will have the meaning of an

academic exercise. The preliminary objection on point of jurisdiction is upheld. The entire application is dismissed. Each party to bear its own costs. It is so ordered.

DATED at **DAR ES SALAAM** this 25th October, 2023.




L. HEMED
JUDGE