

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

MISC. CIVIL APPLICATION NO. 738 OF 2022

(Arising from Application for Stay of Execution No. 91 of 2022;
Originating from Land Case No. 45 of 2015)

**LIM HAN YUNG.....1ST APPLICANT
LIM TRADING COMPANY LIMITED.....2ND APPLICANT**

VERSUS

LUCY TRASEAS KRISTENSEN.....RESPONDENT

Date of Last Order: 12.12.2022
Date of Ruling: 30.01.2023

RULING

V.L. MAKANI, J.

This ruling is in respect of the preliminary objections that was raised by the respondent as follows:

- 1. That the application is misconceived and untenable in law.*
- 2. That the application is bad in law and amounts to forum shopping.*

With leave of the court the objections were argued by way of written submissions. The respondents filed their submissions as was ordered by the court; but up to the time I was writing this ruling, the applicants had not filed their written submissions. Considering that filing of written

submissions is equated to hearing then the court will proceed without the submissions by the applicants.

The submissions on behalf of the respondent were filed by Richard Rweyongeza, Advocate who gave a brief background of the matter. He said the applicants were defendants in a suit that had been instituted by the respondents in this court in Land Case No. 45 of 2015. The applicants lost in this court, so they decided to pursue their rights further by filing an appeal in the Court of Appeal, that is, Civil Appeal No. 219 of 2019. The applicants lost the appeal, but the applicants decided to file an application for review which is Civil Application No. 500/01 of 2022 which is still pending in the Court of Appeal. He said on the other hand, the respondent being successful has decided to enjoy the fruits of her judgment by filing Execution Application No. 91 of 2022. This has prompted the applicants to file an application in the Court of Appeal seeking stay of execution of the decree of the High Court. He said a Single Judge of the Court of Appeal declined to entertain the application for stay namely Application No. 678/12 of 2022 and adjourned for hearing by the Court (Three Justices of Appeal). The said application is therefore pending before the Court of Appeal. He said with that position the applicants have thus decided to file this application.

As for the first point of objection that the application is misconceived and untenable in law, Mr. Rweyongeza submitted that the application is made under Order XXI Rule 27 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**). He said for a party to move the court under this provision there must be a pending case before the court (with the exclusion of the Court of Appeal), therefore where a case is pending before the Court of Appeal, which according to the affidavit, is the application for review, Order XXI Rule 27 of the CPC cannot be applied. He relied on the case of **Petro Robert Myavilwa vs. Rahim A. Mchalikwa & 3 Others, Misc. Land Application No. 21 of 2020 (HC-Mbeya)**(unreported). He said according to the affidavit the pending suit is the application for review now pending before the Court of Appeal and not this court and therefore the application under Order XXI Rule 27 of the CPC is misconceived and untenable in law. He also pointed out that section 95 of the CPC which has been used is also not applicable to move this court where there are clear provisions of the law catering for a situation like the present one. He concluded by pointing out that this court has no jurisdiction, and the application is an abuse of the process of the court

As for the second point of objection that the application is bad in law and amounts to forum shopping, Mr. Rweyongeza said, there is a similar application for stay of execution at the Court of Appeal. He said the applicants are gambling and this amounts to forum shopping. He relied in the case of **The Registered Trustees of Kanisa La Pentrekoste Mbeya, Civil Appeal No. 210 of 2020 (HC-Mbeya)** (unreported). He concluded by condemning the applicants for adopting an improper procedure of riding two horses which is an abuse of the court process.

I have gone through the submissions by Counsel for the respondent. Indeed, since the objections have not been opposed, in essence this means that the applicants have conceded to the preliminary objections that have been raised by the respondent and I hold as such.

But without prejudice to the above, I would also wish to state that this application, as correctly stated by Mr. Rweyongeza is untenable in law and an abuse of the process of the court. It is untenable because an application for stay under Order XX Rule 27 of the CPC requires the pendency of a suit before this court. According to the affidavit by the applicants the pending application referred in the affidavit (paragraph 5) is in the Court of Appeal. According to Order XX Rule 27 read together

with section 3 of the CPC the court is defined to exclude the Court of Appeal. In other words, since the pending application is before the Court of Appeal this court has no jurisdiction, and in fact cannot be moved by the above cited provision of the law. As for section 95 of the CPC this is not of any assistance to the current situation as it caters where there is no specific provision of the law which is not the case in the present instance. This has been stated in the case **Petro Robert Myavilwa** (supra) where my sister Hon. Mongella, J had this to say which I fully subscribe:

"Inherent powers of the court are not invoked in every situation. They are only invoked where there is a lacuna in the law or where the provisions of the law are ambiguous to the extent of prejudicing the rights of the parties. Inherent powers are not invoked where the law is clearly provided."

The second objection was to the effect that the application is bad in law as there is a similar application for stay of execution pending before the Court of Appeal. It is very clear that if this court proceeds with this application and render its decision the pending application for stay of execution at the Court of Appeal would be rendered nugatory. For that reason, this court cannot interrupt proceedings regarding the same subject matter which have already been filed at the Court of Appeal. I agree with Mr. Rweyongeza that the applicants are forum

shoppers and are riding two horses at the same time because it is strange for one to have similar applications in two different courts. Such an unprocedural venture is an abuse of the court's process, and I may say, unethical because similar applications in different courts may result to conflicting decisions causing injustice and leading to parties mistrusting the decisions of the court. It is clear that the applicants' actions reflect a seemingly gambling exercise intended to see which court would grant an order in their favour. In the circumstances, it is absurd for this court to deal with this application knowing that there is a similar application pending in the Court of Appeal.

In the totality, the objections are sustained. The application is bad in law and an abuse of the process of the court, and I therefore proceed to strike it out with costs.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
30/01/2023