

IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM
(CORAM: MUGASHA, J.A., GALEBA, J.A., And MASHAKA, J.A.)

CIVIL APPLICATION NO. 284/17 OF 2019

GM CROSS AFRICA LIMITEDAPPLICANT

VERSUS

FIRST NATIONAL BANK TANZANIA LIMITED.....1ST RESPONDENT

NKAYA COMPANY LIMITED.....2ND RESPONDENT

ADELARD EMMANUEL LYAKURWA.....3RD RESPONDENT

**[Revision of the Proceedings and Order of the High Court of Tanzania
at Dar-es-salaam]**

(Moshi, J.)

dated the 14th day of May, 2020

in

Land Case No. 307 of 2016

.....

RULING OF THE COURT

26th & 31st August, 2022

MUGASHA, J.A.:

The applicant and the 1st respondent had entered into a fiduciary relationship whereby the applicant was availed an overdraft facility of TZS. 500,000,000.00 as working capital. The collateral included a legal mortgage at unspecified sum over a residential property in the name of Valence Simon Lekule over Plot No. 8 Block 25 CT No. 50970 situated at Kariakoo Area in the City of Dar-es-Salaam. The applicant defaulted to service the overdraft, requested a restructuring of the repayment which

was not heeded to by the 1st respondent. Also measures to have the applicant settle the accrued interest were futile and as such, the 1st respondent proceeded to embark on recovery measures which culminated into the sale of the property pledged as collateral. It is against the said backdrop, the applicant unsuccessfully commenced a suit against the respondents seeking declaratory orders and a permanent injunction against the 1st respondent to interfere with the collateral security.

Following the dismissal of the respective suit by the High Court on 14/5/2020, the applicant who is desirous of challenging the impugned decision, has brought the present application seeking the indulgence of the Court to stay execution of the decree and Judgment in Land Case No. 307 of 2016 pending the determination of the intended appeal before the Court. The application is predicated under Rules 11 (3), 4 (2) (a), (b) (c) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) on grounds that, if the order is not granted the following is bound to happen:

- (a) It will condone and blesses fraudulent sale transactions in financial institutions and thereby deprives owners' properties.

- (b) The applicant's inborn right to be heard to the fullest in accordance to the Constitution of our Land Tanzania of 1977 as amended from time to time will be curtailed.
- (c) There will be caused a bureaucratic chaos in regards to the re-registration of Title Deed (Certificate of Title) with reference No. 50970 in respect of plot No. 8 Block 25 at Gerezani Kariakoo area in Dar es Salaam if transfer of the same is done in favour of the 3rd Respondent.
- (d) Loss of business operation and rentals from the tenants having leased stay as demonstrated in application for injunction in the lower court.
- (e) The architectural design of the said house in the designed plot will not be established as it was.

The application is accompanied by the affidavit sworn by **VALENCE SIMON LEKULE MATUNDA**, the Managing Director of the applicant. The respondents opposed the application through their respective affidavits in reply on the ground that, the decree is not executable because the applicant's case was dismissed by the High Court and parties were reverted to former positions before the institution of the case at the High Court. Since the manner surrounding the opposition of the

application raises a question of its competence or otherwise, we invited learned counsel to address us as such.

Upon taking the floor, Messrs. Innocent Mushi and Living Raphael learned counsel for the 1st, 2nd and 3rd respondents respectively contended that a stay to execute a decree or order can only be made in respect of an executable decree which is not the case in the present matter because after the dismissal of the suit, parties reverted to their former positions. Thus, it was argued that, as the impugned decree does not meet the threshold to qualify to be stayed, the present application is rendered incompetent. To bolster the propositions, cited to us was the case of **CATHERINE HONORATI VS CRDB BANK PLC AND TWO OTHERS**, Civil Application No. 42 of 2016 (unreported). Both learned counsel for the respondents urged us to strike out the application with costs.

On the other hand, Mr. Jerome Msemwa, learned counsel for the applicant, apart from acknowledging that the decree is not executable and that the respondents have not filed any application for execution, he was of the view that the intervention of the Court by staying the decree is pertinent because the agents of the respondents by invoking illegal measures have been threatening to evict the applicant from the premises.

On this account, it was Mr. Msemwa's argument that since what the applicant is facing does not fall within the scope of remedies prescribed under Rule 11 of the Rules, this is what prompted her to predicate the application on, among others, Rule 4 (2) (a) and (b) of the Rules. He thus pleaded with the Court to find the application competent and proceed to grant stay order so as to save the applicant's eviction from the suit premises. To support his stance, he cited to us the case of **ATHANAS ALBERT AND FOUR OTHERS VS TUMAINI UNIVERSITY COLLEGE** [2001] TLR 63.

Having considered the contentions of the learned counsel the issue for our consideration is whether the present application seeking stay of execution is competent. Looking at the circumstances surrounding the present application, it is crucial to reproduce the provisions of rule 11 (3) and (4) of the Rules which stipulate as follows:

*"11 (3) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; **but the Court, may***

upon good cause shown, order stay of execution of such decree or order.

(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.

[Emphasis supplied].

The bolded expression shows that; the Court is mandated to stay execution of a decree or order of the High Court or Tribunal which is about to be executed while there is a pending appeal against such decree or order. In addition, the respective application for stay must be lodged not later than fourteen days from the date when the applicant was served with the notice of intended execution or became aware of the intended execution.

It is settled law that, a stay to execute a decree or order, can only be made in respect of an executable decree or order given by a court or tribunal. See: **CATHERINE HONORATI VS CRDB BANK PLC AND TWO OTHERS** (supra) and **ATHANAS ALBERT AND FOUR OTHERS**

VS TUMAINI UNIVERSITY COLLEGE (supra). In the latter case, the applicants filed a suit against the respondents in the District Court and successfully obtained temporary order of injunction pending determination of the suit. The High Court invoked revisional jurisdiction and set aside the injunction order. Aggrieved, the applicants filed a notice of intention to appeal to the Court and then made an application for stay of the revisional order. The Court emphasised on the rationale of restricting the grant of stay in respect of an executable decree or order at page 66 as follows:

*"I am increasingly of the view that, **there is nothing in the High Court Order the execution of which is capable of being stayed.** All what the High Court did was to set aside the Order of the District Court which had restrained the respondents from terminating the applicants' studies. It seems to me that a stay of execution can properly be asked for where there is a court order granting a right to the respondent or commanding or directing him to do something that affects the applicant. In such a situation, the applicant can meaningfully ask the court to stay and restrain the respondent from executing that order pending the results of the intended appeal.*

But in the present case after the High Court had set aside the order of the District Court, there is no order of any court now granting any rights to the respondent or commanding or instructing the respondents to do anything affecting the applicants or, indeed, anyone. There is a clean slate, as it were. Then, the question is Which order of the High Court the applicants are asking this Court to order stay of execution? In my view there was no basis for the applicants seeking a stay of execution of the order of the High Court.”

[Emphasis supplied]

See also: **PATEL TRADING COMPANY [1961] LIMITED AND ANOTHER VS BAKARI WEMA t/a SISI KWA SISI PANEL BEATING ENTERPRISES LIMITED**, Civil Application No. 19 of 2014, **QUALITY GROUP LIMITED VS TANZANIA BUILDINGS AGENCY**, Civil Application No. 69 of 2014 and **KEITH HORAN AND THREE OTHERS VS ZAMEER SHERALI RASHID**, Civil Application No. 230/15 of 2019, (all unreported). In all these cases, the Court emphasised that, an

application seeking to stay execution of a decree which is not capable of being executed is misconceived.

What transpired in the above cited cases and the determination thereof, squarely befits the application at hand. We say so because, following the dismissal of the applicant's suit at the High Court, parties reverted to earlier positions before the institution of the suit. As opposed to what was asserted by Mr. Msemwa, there is nothing in the decree which is granting the respondents or commanding them to evict the applicant from the suit premises.

Thus, as the decree is not capable of being executed, it does not meet the threshold of being allowed or refused by the Court and as such, the application is misconceived.

Moreover, we do not agree with Mr. Msemwa who invited us to invoke Rule 4 (2) (a) of the Rules to remedy the plight of the applicant. We are fortified in that regard because the said Rule can only be invoked where there is no specific prescribed provision for dealing with the matter which is not the case here because matters of stay of execution are regulated by the provisions of Rule 11 of the Rules.

In the circumstances, the misconceived application is hereby struck out with costs.

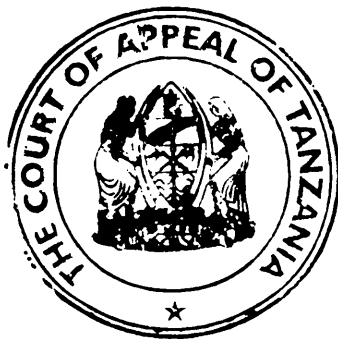
DATED at **DAR-ES-SALAAM** this 30th day of August, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 31st day of August, 2022 in the presence of Mr. Innocent Mushi, learned counsel for 1st and 2nd Respondents also holding briefs for Mr. Jerome Msemwa, learned counsel for the Applicant and Mr. Living Raphael, learned counsel for the 3rd Respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL