

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 230/15 OF 2019

1. KEITH HORAN

2. Z. HOTEL

3. KATIBU KAMATI YA MAENDELEO

SHEHIA YA NUNGWI

4. KAMATI YA MAENDELEO SHEHIA YA NUNGWI

..... APPLICANTS

VERSUS

ZAMEER SHERALI RASHID RESPONDENT

**(Application for stay of execution from the Judgment and Decree of the
High Court of Zanzibar at Vuga)**

(Mwampashi, J.)

dated the 14th day of August, 2014

in

Civil Appeal No. 54 of 2014

.....

RULING OF THE COURT

27th November & 6th December, 2019

NDIKA, J.A.:

By a notice of motion made under Rules 11 (3), (4), (5) (a) and (b), (6) and (7), 48 (1) and 60 (2) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants apply for an order staying the execution of the decree of the High Court of Zanzibar (Mwampashi, J.)

in Civil Appeal No. 54 of 2014 dated 14th August, 2014. The application is supported by an affidavit deposed by Mr. Haji Suleiman Tetere on 25th April, 2019. It is noteworthy that the respondent elected to file no affidavit in reply, which essentially implies that the averments in the supporting affidavit are uncontested.

Briefly, this matter arises as follows: on 12th July, 2013 the Land Tribunal for Zanzibar at Vuga (the Tribunal) entered a default judgment under Order VIII, rule 10 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD) for the respondent against the applicants following the latter's failure to file their written statement of defence within time. Consequently, the respondent was adjudged the lawful owner of the disputed landed property and the applicants were ordered to vacate the said property.

Aggrieved, the applicants applied to the Tribunal under section 33 (2) and (3) of the Land Tribunal Act No. 7 of 1994 and sections 126 and 129 of the CPD for setting aside the default judgment as well as a grant of an extension of time within which they could file their written

statement of defence. By its ruling dated 18th August, 2014, the Tribunal set aside the impugned default judgment and granted the applicants 14 days within which to lodge their written statement of defence. On appeal by the respondent, the High Court of Zanzibar (Mwampashi, J.) quashed the Tribunal's ruling of 18th August, 2014 thereby giving the Tribunal's default judgment a new lease of life.

As it turned out, despite being dissatisfied with the aforesaid judgment of the High Court, the applicants did not lodge any notice of appeal within the prescribed time. However, having sought and obtained an extension of time from the High Court of Zanzibar (Mohamed, J.) vide Civil Application No. 14 of 2016, the applicants lodged a notice of appeal on 28th July, 2017 and filed an application for leave to appeal registered as Civil Application No. 33 of 2017. Meanwhile, the respondent approached the Tribunal and sought execution of the default judgment and decree against the applicants. That fact is evidenced by a copy of the notice to show cause and appear before the Tribunal on 29th April, 2019 which was served on the applicants on 15th April, 2019.

The said notice is attached to the accompanying affidavit as Annexure ZH11.

Prompted by the aforesaid quest by the respondent for execution, the applicants instituted this matter seeking a stay of execution of the decree of the High Court of Zanzibar on the following grounds:

- "1. That, there are material irregularities in the conduct of the proceedings occasioning injustice to the applicants as a result the entire proceedings and judgment at the High Court are a nullity.*
- 2. The applicants will suffer substantial and irreparable loss and great hardship if the orders are executed.*
- 3. The applicants herein are ready to put reasonable security for the order of stay of execution as may be ordered under the circumstances of this application.*
- 4. That if the said order is executed the intended appeal will be rendered nugatory*

and academic exercise to the detriment of the applicants.”

At the hearing of the application before us, Messrs. Haji Suleiman Teterere and Omar Said Shaaban, learned advocates, teamed up to represent the applicants while Mr. Isshaq Ismail Shariff, learned counsel, appeared for the respondent.

Ahead of the hearing, we asked the parties to address us not only on the merits of the application but also on a specific point of law whether the decree of the High Court sought to be stayed was executable and hence capable of being stayed.

For the applicants, Mr. Shaaban submitted that the impugned decree of the High Court is executable and hence it is capable of being stayed. He claimed that if the said decree is stayed, then the impending execution of the Tribunal's decree would be naturally frozen.

As regards the merits, Mr. Shaaban contended that the application has met all the requirements including those stipulated by Rule 11 (5) of the Rules. He said that the applicants invested heavily in the disputed

property by developing it into a hotel and if they are evicted from it and the buildings erected thereon demolished, they will suffer irreparable loss and great hardship. He also added that apart from the applicants' buildings on the disputed property serving as security for the due performance of the decree as it may ultimately be binding, the applicants were ready and willing to furnish any further security as may be directed by the Court.

Mr. Shariff, on the other hand, disagreed. He argued that the impugned decree allowing the respondent's appeal to the High Court is non-executable as it grants no rights. In the premises, he urged us to refuse the application on that ground, also adding that the decree sought to be executed by the respondent is that issued by the Tribunal, which is not the subject matter of the intended appeal to the Court.

On the merits of the application, Mr. Shariff argued that the application does not meet the applicable threshold requirements. Going into detail, he faulted the application for presenting an unsubstantiated claim that the applicant would suffer irreparable loss should the

impugned decree be executed. As regards the requirement to furnish security, he contended that the applicants' undertaking in Paragraph 17 of the supporting affidavit to give the structures erected on the disputed land as security is insufficient to secure the due performance of the decree as it may ultimately be binding on the applicants.

We have carefully and dispassionately examined the notice of motion and the supporting affidavit in the light of the contending submissions of the learned counsel for the parties. It is our firm view that in this matter we need not deal with the merits of the application but the legal issue whether the decree sought to be stayed is executable and capable of being stayed.

At the forefront, it is noteworthy that central to the determination of this matter is Rule 11 (3) of the Rules as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017, Government Notice No. 362 of 2017, stipulating the breadth of the Court's power of stay of execution thus:

*"(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.**"*

[Emphasis added]

We have emboldened the text above to underline that the Court's power under Rule 11 (3) is restricted to staying the execution of the decree or order appealed from. In other words, the said power can only be exercised to halt the execution of a decree or order made by the High Court which is the subject of the intended appeal to the Court pursuant to a notice of appeal already lodged.

As indicated earlier, it is common cause that in the instant matter the applicants seek a stay order against the judgment and decree of the High Court of Zanzibar (Mwampashi, J.) allowing the respondent's

appeal. The said judgment and decree quashed the Tribunal's ruling of 18th August, 2014 that had set aside the default judgment of 12th July, 2013. Although it is notable that by the said High Court's judgment the Tribunal's default judgment and decree were, in effect, restored, as a matter of principle the High Court's decree in appeal is in itself non-executable for the sole reason that it gives no right to any of the parties capable of being executed.

At this point, it is instructive to recall that a single Justice of the Court in **Athanas Albert and Four Others v. Tumaini University College, Iringa** [2001] TLR 63 held that it is only a decree granting a right that can be stayed. The said holding is at page 66 thus:

*"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 for a stay and to restrain the respondent from executing that order pending*

the results of an intended appeal.” [Emphasis added].

The above decision has been followed in numerous decisions of the Court including **Patel Trading Co. (1961) Limited and Another v. Bakari Omary Wema t/a Sisi kwa Sisi Panel Beating Enterprises Ltd**, Civil Application No. 19 of 2014 and **Hamisi Mohamed (as the Administrator of the Estate of Risasi Ngawe, Deceased) v. Mtumwa Moshi (as the Administrator of the Estate of Moshi Abdallah, Deceased)**, Civil Application No. 526/17/2016 (both unreported). The same stance was also taken in **D.B. Shapriya & Co. Ltd. v. Bish International B.V.**, Civil Application No. 67 of 2002; **Bernard Masaga and M.K. Ikungura and Others v. National Agricultural and Food Corporation and Three Others**, Civil Application No. 3 of 2007 and **Dimon Tanzania Limited v. The Commissioner General Tanzania Revenue Authority and Two Others**, Civil Application No. 89 of 2005 (all unreported).

In **Dimon Tanzania Limited** (supra), for instance, the Court, having considered that the decision of the High Court intended to be appealed against was simply a dismissal of an application for the prerogative orders, took the view that the said dismissal order was non-executable and hence incapable of being stayed. We deem it necessary to reproduce the relevant part of the holding of the single Justice of the Court as follows:

"Since the order dismissing the application for leave to apply for orders of certiorari, mandamus and prohibition is not capable of being executed, it goes without saying that it is not capable of being stayed."

In the same vein, in the instant case, the decree of the High Court allowing the respondent's appeal granted no executable right. Thus, as rightly submitted by Mr. Shariff, the said decree is incapable of being stayed and that this Court cannot stay the execution of the Tribunal's decree as it is not the subject of the instant application or the intended appeal to the Court in whose respect the notice of appeal was lodged.

In the final analysis, we find the application misconceived and proceed to strike it out. As the outcome of this matter has been predicated on a point of law raised by the Court on its own motion, we order each party to bear its own costs.

DATED at **ZANZIBAR** this 5th day of December, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 6th day of December, 2019 in the presence of Mr. Haji Suleiman Tetere, counsel for the Appellant and Mr. Tetere holding brief for Isshaq I. Sharif, counsel for the Respondent is hereby certified as a true copy of the original.




A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL