

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A., And MDEMU, J.A.)

CIVIL APPLICATION NO. 153/17 OF 2022

MARYAM NASSOR APPLICANT

VERSUS

1. ABLA ESTATE DEVELOPERS & AGENCY LIMITED

2. NASSOR KHALIFA

3. AHMED NASSOR KHARIFA

4. KCB BANK TANZANIA LIMITED

..... RESPONDENTS

**(Application for Stay of execution from the Judgment and Decree of the
High Court of Tanzania, Land Division, at Dar es Salaam)**

(Mtulya, J.)

dated the 9th day of November, 2021

in

Land Case No. 140 of 2020

.....

RULING OF THE COURT

16th February & 7th March, 2024

MWAMBEGELE, J.A.:

This is an application for a stay of execution of the decree of the High Court pending the hearing and determination of Civil Appeal No. 43 of 2022 pending in this Court. It is made by way of a notice of motion predicated under the provisions of rules 11 (3), 11 (4), 11 (4A), 11 (5) (a), (b), (c), 11 (6), 11 (7), (a), (b), (c) and (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit

deposed by Maryam Nassor, the applicant herein. The application is resisted by an affidavit in reply sworn by Damas Gabriel Mwangange, principal officer of the fourth respondent

The background to the application is set out in the affidavit of the applicant and it may briefly be stated as follows: the applicant had sued the respondents herein seeking, among other things, a declaration that the act of the fourth respondent lending money to the first and second respondents pledging a matrimonial home as security without obtaining spousal consent, was unlawful and null and void. The record of this application shows that the applicant and the second respondent herein were, at the material time, wife and husband through a marriage ceremony officiated in the year 1978. The couple managed to acquire several matrimonial properties including houses on plot No. 489, Mikocheni Phase II Area in Dar es Salaam, under the Certificate of Title No. 30063, hereinafter referred to as the suit property. In the year 2010, the second respondent changed the land use of the suit property from a dwelling house of Nassor Khalifa Group A Class to a residential building Group B Class (d) of M/S Aba Estate Developers & Agency Company Limited (the first respondent). It appears all this was done in the absence of the consent of the applicant as a wife and other two wives since the

second respondent was married to three wives. After changing the land use, the second respondent applied for a loan from the fourth respondent and pledged as security, the suit property. It appears there was default in servicing the loan and, as a consequence, the fourth respondent exercised her right of sale to recover the outstanding balance of the loan.

Upon hearing and determination of the matter, the High Court ruled in favour of the respondents by dismissing the applicant's suit. Undeterred, the applicant instituted Civil Appeal No. 43 of 2022 on 9th February, 2022 which is still pending in this Court. On 25th March, 2022, the applicant was surprised to see advertisements of the public auction of the suit property in the Daily News and Nipashe newspapers. The auction was to be carried out on 16th April, 2022. This prompted the filing of this application on 30th March, 2022. It is the applicant's averment that if the auction sale is allowed to proceed, the applicant and her family will suffer undue hardship, inconvenience and substantial and economic loss since the property is partly used as a residential house by the applicant and her family. The applicant has also averred that she is ready and willing to furnish security for the due performance of the decree in the event the intended appeal fails.

Upon being served with the record of this application, the fourth respondent filed a Notice of Preliminary Objection to the following effect:

"The application for stay of execution is untenable in law because the decree sought to be executed is not capable of execution".

The preliminary objection was argued on 16th February, 2024. The applicant was represented by Mr. Thomas Eustace Rwebangira, learned advocate. While the first three respondents enjoyed the services of Mr. Elly Chirongo Musyangi, learned advocate, the last respondent was advocated for by Mr. Elisa Abel Msuya, also learned advocate.

Arguing in support of the preliminary objection, Mr. Msuya was very brief but to the point. He submitted that the decree sought to be stayed is not executable because the High Court did not give the parties any right in that the suit from which it stemmed was dismissed. Upon a plethora of authorities of the Court, he argued, such decree is not executable. To buttress his proposition, the learned counsel cited to us our decisions in **Hamisi Mohamed (As administrator of the Estate of Risasi Ngawe, deceased) v. Mtumwa Moshi Mohamed (As admimistrator of the Estate of Moshi Abdallah, deceased)**, Civil Application No. 526/17 of 2016, **Kibo Hotel Kilimanjaro Limited v. Consolidated Holding Corporation & Impala Hotel**, Civil Application

No. 105 of 2008, **Hassan Transport Ltd v. Karibu Forwarding & Clearing Co. Ltd**, Civil Application No. 37 of 1999 (all unreported) and **Athanas Albert and 4 Others v. Tumaini University College, Iringa** [2001] T.L.R. 63. The learned counsel thus implored us to strike out the application for being misconceived.

Mr. Rwebangira's response was also short and to the point. He submitted that the determination of the preliminary objection raised a factual issue and will need evidence to prove. The order given, he argued, is executable as it affects the applicant in that the respondent is in the process of disposing of the suit property. If that is done, he contended, the appeal by the applicant will be rendered nugatory. He added that the decree does not agree with the judgment and therefore the Court should give room for amendment of the same as was the case in **Nassoro Abubakar Khamis & Another v. Wakf & Trust Commission Zanzibar and Others** (Civil Appeal 245 of 2020) [2021] TZCA 736 (3 December 2021) TanzLII.

Mr. Musyangi for the first three respondents joined hands with counsel for the applicant; submitting that the preliminary objection needs ascertainment of evidence to sustain it thereby not falling within the scope and purview of a proper preliminary objection. The learned counsel

dubbed the preliminary objection as misconceived and beseeched us to overrule it. He also added that the decree appended to the application for stay of execution offends the dictates of rule 11 (7) (c) of the Rules as it does not tally with the judgment.

Rejoining, Mr. Msuya submitted that if the decree is defective, then it offends the dictates of rule 11 (7) (c) of the Rules thereby making the application for stay of execution incompetent. He reiterated that the preliminary point of objection is on a pure point of law which is based on the pleadings. He insisted that when determining a preliminary objection, the court is not sitting as an appellate court thus it cannot order any rectification of the decree complained of. The learned counsel beseeched us to allow the preliminary objection and strike out the application for being misconceived as prayed in his submissions-in-chief.

The issue we are called upon to decide is whether the decree of the High Court is executable. But before we delve into that determination, we want to give reasons why we refused the prayer for an adjournment of the hearing of this application brought to the fore by Mr. Rwebangira at the outset of the hearing. The prayer was supported by Mr. Musyangi but resisted with some considerable force by Mr. Msuya. The basis of Mr. Rwebangira's prayer for adjournment was that the decree appended to

the notice of motion in its support had some defects which he wanted to rectify making an application for rectification of the same to the Deputy Registrar of the High Court. Mr. Msuya strenuously resisted the prayer stating that the move prayed for was calculated at preempting the preliminary objection filed. Given that the applicants are armed with an *ex parte* stay order, he argued, they are playing gimmicks to delay the decree holder; the fourth respondent, to enjoy the fruits of litigation. After all, Mr. Msuya argued in rejoinder, when hearing an application for stay of execution, the Court is not sitting as an appellate court and therefore it has no powers to order an amendment of the decree prayed for.

We refused the prayer by Ms. Rwebangira. The basic reason why we took that course is found in Mr. Msuya's submissions. It is that; the move was meant to preempt the preliminary objection filed by Mr. Msuya on behalf of the fourth respondent. We agree with Mr. Msuya that the prayer was a delaying tactic to delay the fourth respondent to enjoy the fruits of litigation. As rightly put by Mr. Msuya, if the decree is defective and the applicant wished to have it rectified, the proper forum is in the appeal itself, not in an application for stay. This should suffice to be the reason why we did not grant Mr. Rwebangira's prayer for adjournment.

Adverting to the determination of the preliminary objection, we have posed above the million-dollar issue as being whether the decree of the High Court appended to the application for stay of execution, is executable. It is common ground that the High Court dismissed the suit which was filed by the applicant. That meant that the parties reverted to the status they had before the suit. Such a decree, we have held in a string of our previous decisions, is not executable. Such stance is the hallmark of our previous decisions the cases of **Athanas Albert v. Tumaini University College Iringa** (supra), **Patel Trading Co. (1961) Limited & Another v. Bakari Omary Wema t/a Sisi kwa Sisi Panel Beating Enterprises Ltd.**, Civil Application No. 19 of 2014 (unreported), **Kibo Hotel Kilimanjaro Limited v. Consolidated Holding Corporation** (supra) and **Keith Horan & Another v. Zameer Sherali Rashid & Another** (Civil Application 230 of 2019) [2019] TZCA 438 (6 December 2019) TanzLII, to mention but a few. In **Athanas Albert** (supra) a single Justice of the Court (Kisanga, J.A) was confronted with an akin situation and held at p. 66:

*"... 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; quoted in **Keith Horan v. Zameer Sherali Rashid** (supra)].

Likewise, in **D.B. Shapriya & Company Limited v. Bish International B.V.**, Civil Application No. 67 of 2002 (unreported) another single Justice of the Court (Lubuva, J.A) when also faced with an identical situation, held:

"It is common ground that the purpose of seeking stay of execution is to maintain the status quo obtaining at the time when the judgment and decree, subject of the application for stay was delivered. The High Court order of dismissal of 6.5.2002 merely declared that the application to set aside the award was refused. There is no decree pertaining to the dismissal order which could be executed against the Applicant. This is because the decision of 6.5.2002 does not confer any right which the Respondent could enforce against the Applicant." [Quoted in **Kibo Hotel Kilimanjaro Limited v. Consolidated Holding** (supra)].

Guided by the position we took in the above cases, we have no iota of hesitation to state that in the case at hand, the order of the High Court of 9th November, 2021 dismissing the suit with costs to the respondents did not confer any right to the fourth respondent which she could enforce against the applicant. That order simply meant the parties reverted to the *status quo* they were in before the suit. Armed with the authorities discussed above, we have no scintilla of doubt that a stay order will issue only when there is a court order conferring a right to an applicant against a respondent the execution of which will affect the former. That, as already alluded to above, was not the case in the matter before us.

But before we pen off, we wish to state that in view of the fact that the applicant's counsel was worried that the respondent might dispose of the suit property and was in the process of accomplishing that mission, the proper recourse to seek was, in our view, not a stay order. Our neighbouring jurisdiction of Kenya have a provision in their Court of Appeal Rules, 2022 (accessed through chrome-extension://efaidnbmnnnibpcajpcgicfindmkaj/http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2022/LN40_2022.pdf) that provides in rule 5 (2) (b) thereof for recourse for, *inter alia*, the court to order

injunction or any other order it may think just. The relevant part thereof reads:

"Subject to subrule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(a) N/A

(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just".

We have no such provision in the Tanzania Court of Appeal Rules, 2009, except for the one respecting stay of execution. That "lacuna", if at all, does not, in our view, mean that, that is the end of the world for the applicant; she can still seek such recourse under the very Rules. Our Rules are so wide as to accommodate almost every situation that justice seeks to accommodate in a proper circumstance. We must admit that we admired the ingenuity of Mr. Rwebangira's submissions and really shared his sentiments. However, with unfeigned respect to him, our calling is to follow the letter of the law. In the premises, for the reasons we have supplied, we are unable to give countenance to his submissions, despite being argued with tenacity.

In view of the reasons we have endeavoured to assign, we find substance in the preliminary objection and sustain it. Consequently, we find and hold that the application for stay of execution is misconceived and, as a result, we strike it out with costs to the fourth respondent.

We so order.

DATED at **DAR ES SALAAM** this 5th day of March, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 7th day of March, 2024 in the presence of Mr. Erick Simon holding brief for Mr. Thomas Rwebangira, learned counsel for the Applicant and also holding brief for Mr. Elly Musyangi for 1st, 2nd, and 3rd respondent, Mr. Ndehorio Ndesamburo holding brief for Elisa Msuya, learned counsel for the 4th Respondent is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be 'G. H. Herbert', written over a horizontal line.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL