

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. LAND APPLICATION NO. 77 OF 2021

(Arising from Execution No. 9 of 2021.)

**ZAITUNI KASHINDE JUMA & OTHERS----- APPLICANTS
VERSUS
RAMADHANI JUMA----- RESPONDENT**

RULING

Last Order: 29.10.2021

Ruling Date: 30.11.2021

M. MNYUKWA, J.

This is a Misc. Land Application No 77 of 2021 in which Zaituni Kashinde Juma, Asina kashinde Juma and Aito Kashinde Juma hereafter referred to as the applicants, filed this application before this court against the order of execution in the execution case No. 09 of 2021. The application is supported by the affidavit jointly deposed by the applicants. Through their chamber summons, the applicants pray for an order for stay of execution of the Judgment, Decree and Orders in respect of the House on Plot No.



16, Block "M" at Sukuma Street within Mwanza city. Earlier, at the filing stage, the applicants had the service of Joseph Madukwa, the learned counsel and the respondent afforded the service of Mutalemwa, the learned counsel. It happens that on 06.09.2021 when the matter was before me, the applicants' advocate prays to withdraw from representing the applicants in this application for the reason that he acted as the commissioner for oath in the application and the same as a representative of the applicants' which is contrary to Cap. 12 RE: 2019. Mr. Mutalemwa also prayed to file a counter affidavit which was accompanied with the notice of preliminary objection. The same was filed on 15.09.2011 as it was ordered by the court.

Upon assessment, the applicants' prayer was duly granted consecutively with other necessary orders and the matter was adjourned to 27.09.2021. On the date fixed, the applicants engaged Mr. Moses, the learned counsel.

The respondent's counsel raised preliminary objection on two points of law which are:

- 1. That the prayer to stay the execution proceedings No. 09 of 2021 has already been overtaken by event as the decree in the High Court Land Case No. 68 of 2014 is already executed and the judgment*



debtors and the applicants and their assets have already been removed from the relevant house and the respondent is in the exclusive possession of his house as so ordered by this court by Honourable justice Makaramba on 01.04.2016.

2. Alternatively, the applicants lack the locus standi in the present application.

In the prosecution of the Preliminary objection, the application was argued by way of written submissions where parties complied with the court order dated 29.10.2021. I thank parties for compliance.

Mr. Mutalemwa was the first to submit on the points raised.

On the first point of preliminary objection, he avers that, execution No. 9 of 2021 in which the Applicants intend to stay is now incapable of being stayed on account that the court's decree in land case No. 68 of 2014 as decreed by Ho. Makaramba, J. has already been executed and the respondent is currently in possession of the suit premises.

He went on to refer paragraph 5 of their counter affidavit that, Execution No. 9 of 2021 is finalized and closed as the court appointed court broker S. L. Isangi on 9.9.2021 who effected the court decree by evicting every person found living in the suit premises. The counsel submitted that there is nothing to stay on as of now because the execution has already been



completed. The counsel referred the case of **Highland Estate Ltd v Kampuni ya Uchukuzi Dodoma & Another**, Dsm Registry, Civil Application No. 9 of 2005 (unreported) at page 4 where it was stated that;

"Execution means, quite simply, the process for enforcing or giving effect to the judgement of the court: and it is completed when the judgement creditor gets the money or other thing awarded to him by the judgement"

On the second point of objection, he submitted that, the applicants have no locus stand to pursue any legal right in respect of the suit premises as comprised of Plot No. 16, Block "M", Sukuma Street, Mwanza on account that it has already been decided by this court in land case No. 68 of 2014 and so confirmed by the Court of Appeal of Tanzania in Civil Appeal No. 35 of 2019 (at page 6 and 7 of the Court of Appeal's Judgement) and Civil Application No. 173/08/2020 that the Respondent is the lawful owner of the suit premises.

He further submitted that even when the applicants stated that they have been living in the suit premises for more than 30 years, their contended right of occupation cannot be protected in the eyes of the law as the respondent is the lawful owner of the same house. He further expanded the concept of locus standi through the case of **Peter Mpalanzi v Christina Mbaruku**, Court of Appeal of Tanzania, Civil



Appeal No. 153 of 2019, Iringa Registry (unreported) as it was stated that;

"...Locus standi is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject matter. Unless a person stands in a sufficient close relation to the subject matter so as to give a right which requires protection or infringement of which he brings the action, he cannot sue on it"

Mr. Mutalemwa finalised his submission by submitting that, the applicants have no any right to be protected in relation to the house, therefore the application lacks merit and is misconceived in law for all interests and purposes and he prayed this application to be struck out with costs.

On the applicants' side, Mr. Moses Masami, started by moving this court to consider the filing processes, that the Execution No. 9 of 2021 would not have been moved while the present Application is pending before it for adjudication.

He further averred that, it is revealed by the courts' record that the ruling of the Court in Execution No. 9 was to be delivered on 3rd October, 2021. That for reasons unknown to the applicants, the ruling was delivered earlier before 3rd October, 2021 and thereafter the court appointed Court Broker to effect the execution which was completed and



this court issued an Order marking Execution No. 9 of 2021 to have been finalized and closed.

The counsel questions court's conduct in disposing Execution No. 9 of 2021 and wonders why the court was so fast in delivering the ruling while this Application was still pending in this Court. He goes on to make assumption that there was nothing wrong with the said execution, and if that assumption answers the question why this Court decided to deliver its ruling earlier before 3rd October 2021.

Mr. Moses Musami submitted that, the conduct of the Court in Execution No. 9 was improper and prejudicial to the Applicants' interests and it has certainly taken by surprise.

On the second point of objection, Mr. Moses Musami submitted that, the question of applicants' locus standi in this Application cannot solely be determined on the basis of one's ownership to the land in question. And that, the right question is whether the applicants have interest in land and to what extent. The counsel referred to the case of **Peter Mpalanzi v Christina Mbaruku**, Civil Appeal No. 153 of 2019, Court of Appeal of Tanzania at Iringa Registry(unreported);

"... a person cannot maintain a suit unless he has an interest in the subject matter. Unless a person stands in a sufficient close relation



to the subject matter so as to give a right which requires protection or infringement of which he brings the action, he cannot sue on it"

The counsel elaborated the case as it does not talk about one having a right over the subject matter but an interest in the subject matter. And that in disclosing such interest a person only needs to show that he or she stand in sufficient close relation to the subject matter so as to give a right which requires protection.

The counsel submitted more that, the applicants as they have stated in paragraph 2 of their joint affidavit, they have been living in the disputed premises for over 20 years without disturbance as the land belongs to their grandfather and they have failed to understand how that land has been transferred to the respondent. And that their 20 years of occupation on disputed land without interference from the respondent, makes them to have an interest in the land in question and it establish their relationship to the subject matter.

The counsel went on to state that, since the facts in the case of **Peter Mpalanzi Vs Christina Mbaruku** (Supra) are distinguishable from the facts of the application at hand, then a question at hand is not whether the contented 20 years of occupation can be protected under the law but whether such occupation and their relationship with Juma



Mwango (their deceased grandfather) makes the applicants herein have an interest in the land in question.

The counsel finalized his submission by submitting that, he sees no reason for this court to fault Applicant's interest in the land in question and so did the execution in Execution No. 9 of 2021 and that the order was improperly made and he prayed the points of preliminary objection raised by the respondent be overruled and the applicants be heard on their application on the orders sought.

In re-joining, the respondent counsel reiterates his submission in chief and submitted further that, the present application has already been overtaken by event and as such there is no any execution steps/proceeding to be stayed in the eyes of the law.

He further submitted that, the applicants have no any proprietary right over the landed property which deserves to be protected in law on account that the respondent stands as a sole owner of the same property as so decided by the Court of Appeal of Tanzania in both Civil Appeal No. 35 of 2019 and Civil Application No. 173/08/2020.

The counsel finalised his rejoinder by submitting that, the applicants' argument that they have been living in the house in dispute, is a mere an afterthought as a contention cannot in law override or downplay the



decision already made by the Court of Appeal of Tanzania in Civil Appeal No. 35 of 2019 and Civil Application No. 173/08/2020 in which the respondent has been declared and so confirmed as the lawful owner of the relevant house/landed property. He prayed the objection to be sustained and the present application dismissed in its entirety.

After going through the available record, this court called the parties to address whether in the first place the court had the jurisdiction to entertain the matter. The applicant was the first one to address the court and submitted that he was instructed by Kashinde Juma to represent the parties in the present application during the eviction that originated in Execution No. 9 of 2021. He went on that by that, time there was also the objection proceedings that was pending before Hon, Mashauri , J and the application for stay of execution. That he was later on informed that his clients lost in the objection proceedings but the other application was still pending. On the issue of jurisdiction, he submitted that this court had the jurisdiction though there was some irregularity in the present application but that does not render the court to have no jurisdiction.

Responding, the Respondent's counsel submitted that, the one who instructed the Applicants counsel, Kashinde Juma is not party of the case. In respect to jurisdiction, he averred that this court had no jurisdiction



because the matter was overtaken by events and the present applicants are not parties to the case in which the execution was already done.

This court prompt the parties on the issue of jurisdiction after realized that the applicants had exhausted all the available remedies in our jurisdiction to demand their justice. After the decision of the High Court, the applicant made a full use of an opportunity to appeal to the Court of Appeal and for review on the same court and the decision was delivered. Though the present application is not brought by the parties to the case, even the parties to the case could not have right under the law to bring an application for stay of execution after the matter has already been decided by the Court of Appeal as they have done in this case.

This is because Order XXXIX Rule 5 of the CPC, Cap 33 R.E 2019 provides that, the High Court may for sufficient cause order stay of execution of a decree against which an appeal has been preferred on it and an application for stay of execution can only be granted when the decree is one from which an appeal lies. It is also important to note that an order for stay of execution cannot be made unless the conditions provided for under Order XXXIX Rule 5(3) are met. Therefore, from the beginning this application was misplaced, because this court do not have power in the circumstances of this case to stay execution.

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Coming back to the present application, starting with the first point of objection, It is my considered view that the essence of provision of Order XXI Rule 24(1) of the Civil Procedure Code [Cap 33 RE 2019] is to allow the disputed subject matter to maintain its status quo while the parties sort out other matters before the court, in order to prevent the losing party to suffer irreparable loss if the decree of the court is executed by the decree holder. This can be seen in a number of case law such as; **Felix Emmanuel Mkongwa Vs Andrew Kimwaga, Civil Appeal No. 249 of 2016 Tanzania Court of Appeal (unreported)** where the court said that;

"...the rationale behind the process of seeking stay of execution is to enable the unsuccessful party in criminal or civil proceedings, who has lodged a notice of appeal and/or preferred an appeal, to maintain the status quo of the matter obtaining at the time of the application until the hearing and determination of the pending appeal."

This has been also discussed in the case of **Separatus Tryphone Katambula Vs Salumu Mohamed Said, Misc. Land Appl. No. 170 of 2017 (unreported)** where the court said;

"It is clear that, after the decisions of the court in any particular civil or case, usually, stay of execution is sought by losing party in order to



maintain the status quo obtaining at the time of the application until the appeal pending is determined."

From submissions of both parties, it was made clear to me that Execution No. 9 of 2021 has already been executed by removing every person found living in the suit premises including the applicants and the suit premises given to the respondent. It was further revealed that there was an order dated 13/09/2021 by the Deputy Registrar marking Execution No. 9/2021 finalised and closed. This means that this application is meaningless and overtaken by event as there is no any decree to stay as the execution is already finalised.

My decision is also guided by the position of the Court of Appeal of Tanzania in the case of **Project Manager of Nomreco vs Joseph Urio and Nakara Auction Mart**, Civil Application No. 72 of 1998 (unreported) in which Lubuva, JA stated that:

"The stay of the execution on a matter which has been executed cannot serve any useful purposes because the matter has been overtaken by event."

On the second ground of preliminary objection, the respondent objected that the applicants lack locus standi in the present application. The respondent's counsel referred to the case of Peter Mpalanzi (supra) and

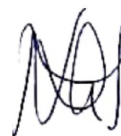


insisted that the applicants have no rights to be protected in relation to the house and therefore, the application is misconceived.

In reply, the applicants counsel submitted that the question as to whether or not the applicants have the locus stand in the present application cannot solely be determined on the basis of one's ownership to the land in question.

Upon going through the available record in the case file, I find the parties to the case in the High Court were Ramadhan Juma vs Amina Maulidi Ambali, Rose Kashinde, Masaki Kashinde and Idd Kashinde. The decision was issued in favour of Ramadhani Juma who is now a respondent. Dissatisfied with the decision the three respondents except Iddy Kashinde now the applicant appealed before the Court of Appeal in Civil Appeal No 35 of 2019 and the decision was delivered in favour of Ramadhani Juma.

Being aggrieved again by the decision of the Court of Appeal, the same three respondents applied for review in the same court and the application for review was declared to be devoid of merit. Surprisingly, the present application for execution was filed by Zaituni Kashinde Juma, Asina Kashinde Juma and Aito Kashinde Juma who were not parties to the



main case and the Application for Execution No 9 of 2021. It is my considered view that, the parties had no locus standi in the present application and therefore the second ground of preliminary objection is sustained.

In the final result, I find the present application has no merit and it is hereby dismissed.

No order as to costs since the parties are relatives.

It is so ordered.



M.MNYUKWA
JUDGE
30/11/2021

Ruling delivered on 30th day of November, 2021 via audio teleconference whereby all parties were remotely present.



M.MNYUKWA
JUDGE
30/11/2021