

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: KOROSSO, J.A, KITUSI, J.A And KHAMIS, J.A.)

CIVIL APPLICATION NO. 343/17 OF 2022

COCODACOR GENERAL COMPANY LTD.....APPLICANT

VERSUS

UNYIHA ASSOCIATES CO. LTD1ST RESPONDENT

CHARLES MPAMBA CHENZA.....2ND RESPONDENT

KBM AUCTION MART LIMITED.....3RD RESPONDENT

**(Application for stay of execution of the judgment and decree of the High Court of
Tanzania, Land Division, at Dar es Salaam)**

(Msafiri, J.)

dated the 19th day of April, 2022

in

Land Appeal No. 3 of 2021

RULING OF THE COURT

14th Feb. & 8th March, 2024

KHAMIS, J.A.:

Before us is an application for stay of execution of the judgment and decree of the District Land and Housing Tribunal for Kinondoni in Land Application No. 451 of 2020. The application was brought by notice of motion under rule 11 and 48 (1) of the Tanzania Court of Appeal Rules, 2009 [the Rules]. An affidavit affirmed by one Halima Omari Dendego, the Managing Director of the applicant company, supported the application.

The application is premised on the grounds that, COCODACOR General Company Limited, hereinafter the applicant, has filed a notice of

appeal and awaits to be supplied with copies of the proceedings, judgment and decree of the High Court for purposes of appeal. Further, it is contended that, if execution is not stayed, the applicant stands to suffer huge economic losses and will be prejudiced as the respondents intend to evict her from the disputed premises.

To put matters into context, the applicant instituted Land Application No. 451 of 2020 in the District Land and Housing Tribunal for Kinondoni [the DLHT] for declaration that she fully paid the respondents, a six years' lump sum rent as per the lease in respect of the demised premises on Plot No. 1334, Block A, Kilungule Street, Bunju area, Kinondoni, Dar es Salaam. Apart from other reliefs, the applicant moved the DLHT to issue a permanent injunction to restrain the respondents, their agents, employees and or any other person acting under them to evict her from the demised premises.

Upon trial, the DLHT rejected the applicant's claims and dismissed the suit. Further, it sustained the respondents' counter claim and declared that, the applicant had defaulted to pay rent hence breached the lease. Acting under section 103 (1) of the Land Act, No. 41 of 1991, Cap. 7 R.E 2019 [now R.E 2022], the tribunal made an order that the applicant be evicted from the disputed premises popularly known as Wiza Social Hall.

Resentful of the decision, the applicant unsuccessfully appealed to the High Court, Land Division, vide Land Appeal No. 03 of 2021. On 19th day of April, 2022 the High Court [Msafiri, J], upheld the trial DLHT's decision and thereby, dismissed the appeal with costs. On 24th April, 2022 the applicant applied for certified copies of the proceedings, judgment and decree for purposes of appeal and the following day, 25th April, 2022, issued a notice of appeal.

This application was lodged on 17th June, 2022. According to the affidavit in support of the notice of motion, in addition to the notice of appeal, the applicant filed an application for leave to appeal to this Court. Before that application was heard and or determined by the High Court, the respondents recommenced the pending application for execution in the DLHT [Execution Application No. 2 of 2022]. It was further deposed that, on 3rd June, 2022, the DLHT opened the doors for the applicant's eviction by granting the respondents' application.

The respondents filed a joint affidavit in reply sworn by one Godfrey Francis Alfred, learned advocate, who was duly appointed to represent both of them. Apart from the general denials, he deposed that, the applicant was aware of the execution proceedings much earlier than the date alleged. He averred that, the applicant was served with the summons and copy of the application for execution on 9th January, 2022 and that

since then, she has been appearing in the DLHT for mention and hearing of the application until 3rd June, 2022 when it was determined.

Other than an affidavit in reply, the respondents filed two sets of preliminary objections. In the first set lodged on 15th July, 2022, the application was challenged on four grounds, namely: It is hopelessly time barred; it is res judicata to High Court Misc. Land Application No. 03 of 2022; it was filed in abuse of the court process; and; service of the application on the respondents was effected out of time. In the second notice of preliminary objection presented for filing on 26th October, 2022, the respondent generally stated that, the application is time barred.

At the hearing of the application, Messrs. Herman Kilenzi and Godfrey Francis Alfred, learned advocates, appeared for the applicant and the respondents, respectively. Both counsel had filed written submissions in support of their respective cases. However, in line with the practise of the Court, we invited them to firstly, address us on the preliminary objections.

Mr. Godfrey Alfred was the first to take the floor. He impressed on us that, the second set of objection was essentially a repetition of the first set and prayed to have it abandoned. Therefore, he vigorously supported the grounds of objection enumerated in the set of 15th July, 2022. However,

allegations that the application was an abuse of the process of the court and had been served on the respondents out of time were dropped.

On the allegation that the application is hopelessly time barred, Mr. Alfred contended that, the applicant was served with the application for execution on 9th January, 2022 and continued to attend proceedings on 31st January, 2022; 25th February, 2022; and 3rd June, 2022. He asserted that, counting from 9th January when the applicant was served with copy of the application for execution to 15th July, 2022 when this application was lodged, a total of 154 days had lapsed hence beyond the 14 days within which the application for stay of execution was to be filed.

On *res judicata*, the respondents' counsel contended that, immediately after dismissal of Land Appeal No. 03 of 2022, the applicant filed an application for stay of execution [High Court Misc. Land Application No. 03/2022] which was dismissed on 24th February, 2022 [Msafiri, J]. He also argued that, filing a similar application which resembles the dismissed application, renders this matter *res judicata*.

In reply, Mr. Kilenzi strongly opposed the objections raised. He contended that, it was erroneous to allege that, the application is time barred bearing in mind that, an application for stay of execution can only

be filed upon issuance of a notice of appeal by virtue of rule 11(3) of the Rules.

The learned counsel admitted that, a notice for hearing of the application for execution was served on the applicant way before the High Court decided the appeal, but argued that, the applicant could not lodge an application for stay in absence of a notice of appeal. According to him, the said notice of appeal was issued immediately after the High Court decision was rendered.

Further, the applicant's counsel revealed that, the notice of appeal was issued on 28th April, 2022 following which, the DLHT ordered an eviction of the applicant on 3rd June, 2022. In that line, he argued that, filing the present application on 17th June, 2022 was well within the 14 days prescribed by the Rules. He added that, the applicant became aware of the said order on 3rd June, 2022 which is a day to be reckoned in counting the time for filing this application.

On *res judicata*, Mr. Kilenzi urged us to disregard the respondents' assertions on the ground that, *res judicata* is only applicable to proceedings handled by the same court or courts of concurrent jurisdiction. Relying on section 9 of the Civil Procedure Code, Cap. 33 R.E 2022 [the CPC], the learned counsel contended that, this application

cannot be *res judicata* to the High Court decision in Misc. Land Application No. 03 of 2022 because the two matters were filed in two different courts of different jurisdictions. There was no rejoinder by the respondents' counsel.

We have carefully examined the counsel rival submissions and in our view, the main issue for determination is whether the application was timely lodged.

An application for stay of execution is regulated by rule 11 of the Rules. Rule 11 (4) provides that, an application of that category should be filed within fourteen days of service of the notice of execution on the applicant or from the date he becomes aware of the existence of an application for execution.

At the outset, we partly agree with Mr. Kilenzi that, no application for stay of execution may be filed in this Court before a notice of appeal is lodged. Rule 11 (3) and (7) (a) of the Rules is very clear on this. However, we differ with him on the assertion that, in computation of the time within which to file an application for stay of execution, regard should be given to the date of filing a notice of appeal. In our respectful view, such time is to be reckoned from the date of service of the notice of execution on the

applicant or from the date he/she is made aware of the presence of an application of that nature against him or her.

It is not disputed that this application was filed on 17th June, 2022. It is mutually understood that, the applicant was initially served with copy of the application for execution on 9th January, 2022. However, going by the requirements of the Rules, no application of this nature could have been filed by the applicant on or immediately after 9th January, 2022 to 19th April, 2022 because the High Court was yet to determine the parties' appeal and therefore there was no notice of appeal in this Court.

Upon examination of the record, we noted that, annexure "BIA – 4" to the affidavit in support of the application is a copy of the proceedings of the DLHT for 3rd June, 2022. The same show that, on the set date, Mr. Hassan Chande, learned advocate, appeared for the applicant and Mr. Godfrey Francis, also learned advocate, acted for the respondents.

However, the record before us is silent as to how the parties were summoned to appear for hearing on 3rd June, 2022. We are left to imagine on a number of questions: Were the parties summoned to appear in the DLHT on the same date of hearing [3rd June, 2022] or were they informed a day(s) before? Were the parties physically given a summons to appear or just telephoned, emailed, or messaged to appear before the learned

chairman of the DLHT? If a summons was ever issued, when was it issued and or received by the applicant? Unfortunately, neither the notice of motion, the affidavit in support thereof, the affidavit in reply nor the learned counsel submissions assisted us in exhausting these material issues.

We are also mindful that, before the High Court made its decision on the parties' appeal, an application of this nature could not be filed in this Court. It is on record that, Land Appeal No. 03 of 2021 was dismissed by the High Court [Msafiri, J] on 19th April, 2022 and subsequently, a notice of appeal was issued on 28th April, 2022.

We are not convinced by the respondents' counsel assertion that, the parties' appeal in the High Court was concurrently conducted with the execution proceedings at the DLHT. It is unlikely for the applicant to attend execution proceedings at the DLHT between 9th January and 19th April, 2022 when the High Court handled the appeal. We hasten to add that, even if that was the case, the same could not be considered in calculating time limitation in absence of a notice of appeal against the High Court decision.

It is a common ground that, following dismissal of Land Appeal No. 03 of 2021 by the High Court, the respondents as decree holders, moved

the DLHT to resume execution proceedings. Following that step, it is a legal requirement for the DLHT to issue a fresh summons for parties' appearance.

Unfortunately, neither the affidavit in support of the application nor the respondents' affidavit in reply, disclosed what transpired in the DLHT after Land Appeal No. 03 of 2021 was dismissed by the High Court. Given that we were only supplied with proceedings of the DLHT dated 3rd June, 2021 but the previous ones are missing, we are unable to ascertain as to when the applicant became aware of the recommenced application for execution.

We are convinced that, in absence of a summons calling upon the applicant to appear in the DLHT for recommenced execution proceedings following decision of the High Court on appeal, it is very unsafe to sweepingly conclude that, this application was filed beyond or within the time prescribed under rule 11 (4) of the Rules. At best, mindful of the applicant's duty to show the date she became aware of the recommenced application for execution at the DLHT, we fault her for failure to disclose that material information in the affidavit in support of the application.

In the circumstances, and for the aforesaid reasons, we see no reason of addressing the second limb of objection. Instead, we strike out

this application for incompetency. Having regard to the nature of the dispute which involves family members as reflected at page 2 of the judgment of the DLHT, we make no order for costs.

DATED at DAR ES SALAAM this 7th day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 8th day of March, 2024 in the presence of Mr. Richard Gida, learned counsel for the applicant and also holding brief for Mr. Geoffrey Francis, learned counsel for the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL