

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

**MISCELLANEOUS COMMERCIAL APPLICATION No. 166
OF 2017**

(Originating From Commercial Case No. 95 of 2012)

MATHEW PARSEL CHAWANGA.....1st APPLICANT

JUMA KWANGAYA.....2nd APPLICANT

Versus

KCB BANK TANZANIA LIMITED.....1st RESPONDENT

MBASI TRADING COMPANY.....2nd RESPONDENT

CRISPINE PROSPER MWOMBEKI.....3rd RESPONDENT

KISHE AUCTION MART CO. LTD.....4th RESPONDENT

RULING

MRUMA J.

The applicants through their lawyers M/s MNL Law Chambers brought this application for stay of execution of the judgment and decree in Commercial Case No. 95 of 2012 pending the determination of the appeal; now pending in the Court of Appeal of Tanzania.

The respondents through their lawyers Trustmark Attorneys filed a notice of preliminary objection challenging the jurisdiction of this court on two points namely:-

1. That this court has no jurisdiction to determine this matter on account of a pending appeal filed and which is currently pending in the Court of Appeal;
2. That the court cannot entertain the present matter for it is *functus officio*

Commercial Case No 95 of 2012 was a Summary Suit and it was disposed of summarily by another Judge Hon. Nchimbi J (as he then was) following the Defendants failure to obtain leave to appear and defend the suit. Execution of the decree in that case was carried out and the property the subject matter of the present proceedings was sold to the Second and Third Respondents herein.

The Applicants were aggrieved and applied for stay of execution of the decree through Miscellaneous Commercial Cause No. 126 of 2013 which was dismissed by Makaramba J on 18. 11. 2014. A similar application (i.e. for stay of execution) through Miscellaneous Commercial Application No. 336 of 2014 was once again dismissed by this Court (Makaramba J) on 17th December, 2014.

On 6th March 2015, the Applicants filed Miscellaneous Commercial Application No.44 of 2015 seeking for orders to restrain the Court Broker from selling the house in dispute. On

16th April 2015, this court Mansoor, J, dismissed that application on preliminary objection which was raised by the Respondent.

On 28th April, 2017 this court ordered the Applicant to give vacant possession of the house which was sold to the Second and Third Respondents in execution of the decree. The present application emanates from that order.

After a length brainstorming by counsel for the parties about the legality or otherwise propriety of this preliminary objection which was raised without there being a counter affidavit I ordered counsel for the Respondent to avail the court with authorities that court can entertain a preliminary objection without there being a counter affidavit. The authorities were availed to the court. After going through them supplied to me I was satisfied that court can entertain a preliminary objection which is raised without there being pleadings with some possible consequences to the party raising it if at the end of the day it is dismissed. Thereafter I ordered counsel for the parties to file Skeleton written arguments for and against the preliminary objection. Both counsel gracefully filed in Court written skeleton arguments and relied on a number of authorities in support of their respective positions.

Generally the purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising

his/her undoubted right of appeal are safe guarded and the appeal if successful, is not rendered nugatory.

The conditions for granting Stay of Execution pending appeal are mainly two;

- a. Whether there is an arguable appeal.
- b. Whether the appeal would be rendered nugatory if such application is not granted.

In an application for Stay of Execution pending appeal, the court has to review proceedings and yet not prejudge the appeal so as to make sure that it is not lightly interfering with the order of the court but on the other hand preserving the status quo so that the appeal will not be rendered nugatory. Courts should avoid saying anything that indicates a concluded view as to the merits of the action on fact or law because the ruling may be the subject matter of the appeal and will have to be heard and dealt with thereafter. It is not for the trial court or the Court appealed from in an application for stay of execution pending appeal to consider its own decision and to find out whether it was probably wrong, and to assess the chances of the appeal against its decision succeeding. Thus, I will no deal with the conditions for granting the stay which are expounded above.

But guided by the above principles and in view of the preliminary objection raised, I will have to ask myself whether

the application in this matter is intended to preserve the status quo which is the subject of the appeal.

As the narration above would suggest in the present application the applicants and the Respondents are in agreement that execution had already been concluded. The order for vacant possession had already been made. The question that follows is; does this court clothed with necessary jurisdiction to stay execution?

The respondents' counsel contends that execution was completed or concluded in 2015 but the applicants are still in possession of the suit house. From the records and submissions of both parties it is therefore apparently clear that execution was concluded but the applicants and their agents have resorted to delaying tactics in handing over the property to the 2nd and 3rd Respondents despite the order for vacant possession. In the circumstances this court cannot order a stay of execution because the execution had already been concluded and the order for vacant possession made. The court is now functus officio to make similar orders. What remains is the carrying out of those orders which is rather administrative.

Secondly, assuming that execution process had not been concluded as is the case here the next question would be jurisdiction to grant the orders sought in the chamber application in view of the decision of the Court of Appeal in the case of **Aero Helicopters (T) Ltd Versus F.N. Jensen [1990] TLR 142** where it was held that once proceedings of

appeal to the Court of Appeal have been commenced the High Court could not properly apply Section 95 of the Civil Procedure Code for simple reason that the proceedings are no longer in court as required under Section 2 of the Code.

The present application is pegged under the provisions of **Order XX1 Rule 24(1) and Section 38(1) and 95 of the Civil Procedure Code**. All the provisions cited are under the Civil Procedure Code. Section 2 of the Code provides that:-

"Subject to the express provisions of any written law, the provisions of this Code shall apply to all proceedings in the High Court of the United Republic, Courts of Resident Magistrate or District Courts"


As stated hereinbefore there is no doubt that as execution proceedings have been concluded in this court and appeal proceedings have been commenced in the Court of Appeal. By commencing the appeal process in the Court of Appeal it implies that the proceedings are no longer in this court as required by Section 2 of the Code.

It is for those reasons therefore that the applicants' application for stay of execution is misplaced, misconceived and not tenable in law. Execution had already been done and order for vacant possession given. Their eviction from the property is proper and will do justice to the parties in this case as far as the orders of this court are concerned. In any event litigation

must come to an end in one court and the end of litigation is signified by execution of the court order.

In conclusion, I have considered the submissions of the Respondents' counsel and I have reviewed the record in this matter I make a finding that this court has no jurisdiction to entertain the Applicants' application. Accordingly therefore, this application is dismissed with costs.

Order accordingly.


A.R. Mruma,

Judge.



Dated at Dar Es Salaam this 9th Day of February, 2018.