

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO 19 OF 2018**

**BETWEEN**

**MTI INVESTMENT LIMITED.....DECREE HOLDER**

**Versus**

**CHOBO INVESTMENT LIMITED.....JUDGMENT DEBTOR**

Last order: 15<sup>th</sup> July, 2021

Date of Ruling: 24<sup>th</sup> August, 2021

**RULING**

**MKEHA, J.**

The Judgment debtor has through Mr. Muguli Sifael learned advocate filed an affidavit and a supplementary affidavit to show cause why an application for execution should not proceed as decreed. From the Decree holder's side a counter affidavit of Ms. Carolyn Jacob Muro was filed insisting why the application for execution should be granted

prayed. Hearing proceeded by way of written submissions. Only the Judgment debtor filed her written submissions.

Submitting on the reasons why execution of the decree should not proceed as decreed, two reasons have been assigned, **one**, that, there is a notice of appeal to the Court of appeal of Tanzania and since the certified copies of proceedings have not been supplied to the J/D, it is difficult to prepare the record of appeal. The cases of **AHMED MBARAKA V MWANANCHI ENGINEERING AND CONTRACTING CO LTD, CIVIL APPLICATION No 229 of 2014, CAT, AERO HELICOPTER (T) LTD V F.N JANSEN [1990] TLR 142** and **TANZANIA ELECTRIC SUPPLY COMPANY LIMITED V DOWANS HOLDING, CIVIL APPLICATION NO 142 OF 2012, CAT** (Unreported) were cited in view of convincing the court not to proceed entertaining execution proceedings.

**Two**, that, should the execution process be allowed to proceed the decree holder would not be able to pay back the decretal sum in case the intended appeal is decided in favour of the judgment debtor, considering that the decree holder's source of income is unknown.

In terms of paragraph 7 of the counter affidavit the Judgment debtor had not taken any step aiming at obtaining copies of proceedings for

appeal purposes. In view of the learned advocate for the Judgment debtor, her client had no obligation to frequently follow up on the necessary documents for appeal. The issue is **whether pendency of a notice of appeal is a sufficient cause for not granting an application for execution.**

It is true that in **MBARAKA`S CASE** the Court expressed the view that *it would be prudent for officers authorizing execution to do so in cases whereby there is no appeal pending or where none of the parties has initiated the appeal process.* However, in the case of **TANZANIA BUREAU OF STANDARDS Vs. ANITA KAVEVA MARO, CIVIL APPLICATION No. 54/18 of 2017, CAT** (Unreported) the Court held that the observation of the Court in *Mbaraka`s case* that execution process ought to stop on initiation of the appeal process was a mere obiter dictum. It is equally true as decided in **AERO HELICOPTER and DOWANS** cases that, once a notice of appeal has been lodged the High Court ceases to have jurisdiction over the matter against which notice of appeal is lodged. The High Court cannot order stay of execution pending appeal to the Court of Appeal. At that stage, it is the Court of Appeal which can entertain an application for stay of execution after filing of notice of appeal. The Judgment debtor did not refer to any such

application before the Court. The position of the law remains to be that, notice of appeal is not an appeal and cannot operate as a bar to execution proceedings before the trial court. Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33, R.E 2019 provides that:

*"an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the court may order appealed from except so far as the court may order, nor shall execution of decree be stayed by a reason only of an appeal having been preferred from the decree but the court may for sufficient cause shown order the stay of execution of such decree."*

Therefore, pendency of an appeal or filing of notice of appeal cannot operate as a bar to execution of a decree. Neither of the cited case laws is to the effect that pendency of an appeal suffices to operate as an order of stay of execution. The cited cases merely insist that once notice of appeal has been filed to the Court of Appeal, it is the Court of Appeal which should entertain an application for stay of execution of the decree sought to be appealed against.

In circumstances whereby the Judgment debtor did not address reasons for not seeking an order for stay of execution I see no need of addressing her other reasons of why the application for execution should

not be granted. For the foregoing reasons, I hold that the J/D has failed to show cause as to why the D/H should not be allowed to enjoy fruits of herdecree . Application for execution is granted in the manner prayed in the application for execution dated the 29<sup>th</sup> March, 2021.

Dated this 24<sup>th</sup> August, 2021.

  
**C.P. MKEHA**

**JUDGE**

**24/08/2021**

**Court:** Ruling is delivered in the presence of the parties advocatetes.



  
**C. P. MKEHA**

**JUDGE**

**24/08/2021**