

TANZANIA / JUDGMENT

ALBERT JACOB

COURT
TANZLIIDECIDED
26 July 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT ARUSHA MISC. LAND APPLICATION NO. 8941 OF 2024 AGNESS LEMBRIS TAIKO APPLICANT VERSUS MBOYOO JUMA MOLLEL 1st RESPONDENT NATIONAL MICROFINANCE BANK 2nd RESPONDENT AR COMPANY LIMITED 3 rd RESPONDENT

RULING

20th June & 26th July 2024 TIGANGA, J The applicant has moved this court under the provision of order XXI rule 24, section 68 (e) and section 95 of the Civil Procedure Code Cap 33 R.E. 2019 filed under the certificate of urgency, seeking for an interim order staying the 2nd and 3rd respondents, their agents, workmen or any other person working under their instruction from executing the legal mortgage illegally concluded by using the applicant's matrimonial home to wit; Plot No. 112, Block "HH", Lamara, within Arusha region, pending determination of Land Appeal No. 22 of 2022 which is pending before this court. The application is further supported by the sworn affidavit of the applicant which is to the effect that; the 1st respondent secured a loan from the 2nd respondent and the suit land was placed as a collateral to the loan. The applicant is the legal wife of the 1st respondent. According to her, the mortgaged property is a matrimonial home which was pledged as security to the loan without her consent. The applicant went on to state that she filed a case before the District Land and housing tribunal through Land Application No. 55 of 2021 which was however dismissed for non-appearance. That was followed by the appeal filed to this court, nevertheless, the 3rd respondent has issued 14 days' notice intending to sell the mortgaged property and that is why she has filed this application. The applicant concluded that she will suffer irreparable loss if the respondents are allowed to execute the legal mortgage by selling the matrimonial home and while her appeal is due for hearing. Upon being served with the application, the 2nd respondent opposed the application through the counter affidavit affirmed by one Fadhili Maliki, the principal officer of the 2nd respondent. In opposing the application, the 2nd respondent contended that the applicant is the wife of the 1st respondent and that she was aware of the mortgaged property 2 that was used to secure the loan that was advanced to the 1st respondent. Mr. Fadhili went further to state that the applicant consented in writing to mortgage the suit property and that she filed the said application at the tribunal to prevent the 2nd respondent exercising her lawful power of sale of the mortgaged property. He also added that the mortgage was created and was registered in respect of Plot No. 112, Block "HH" Lemara, Arusha City which was charged as security for the loan advanced to the 1st

respondent. When the matter was called on for hearing before me, the applicant enjoyed legal services from advocate Asubuhi John Yoyo, on the other hand, the 2nd respondent was represented by advocate Rodgers Godfrey Mlacha. With leave of the court, the application was disposed by way of written submissions. Submitting in support of the application, Mr. Yoyo submitted that the application at hand has met the requirements for this court to grant stay of execution for reasons that were advanced by the applicant in her affidavit. Expounding on the said requirements for the grant of this application, the counsel pointed out that there is a pending appeal before this court waiting determination. He went on to submit that even the appeal which is before this court is not a substantive one but a trivial appeal on refusal to set aside the dismissal order. The counsel maintained that the applicant is likely to suffer irreparable loss if her matrimonial property is sold before determination of her intending appeal. To support his arguments, the learned counsel cited the following decisions of the Court of Appeal of Tanzania; *Magret Thomas vs Matilda Philip* 7 2others, Civil Application No. 226 of 2024, *Chitegetse Monica Migembe vs Akiba Commercial Bank*, Civil Application No. 74 of 2024 and *Ongujo Wakibara Nyamarwa vs Beatrice Grayson Mmbaga*, Civil Application No. 200/17 of 2021. The applicant thus prayed for the stay of the intended execution pending determination of the appeal. Responding to the applicant's submission Mr. Mlacha submitted that the order which is sought in this application can only be granted by the court only where there is a court order granting a right to the respondent or commanding or directing the party to do something that will affect the applicant. He supported his argument with the decision in the case of *Maryam Nassor vs ABLA Estate Developers & Agency Limited & others*, Civil Application No. 153/17 of 2022 [2024] TZCA 168 (7 March 2024). The counsel went on to state that the question that arises from the matter at hand is whether an order of the tribunal confers a right to the 2nd respondent against the applicant following the fact that the tribunal dismissed the suit for non-appearance and therefore the parties reverted to their status they had before. The counsel added that since the applicant is worried that the 2nd respondent might dispose the mortgaged property; the proper recourse was not to seek for a stay order but an injunction. Nevertheless, the counsel was of the view that, even if this court assumes that the application at hand is tenable, the application has not met the conditions stipulated under order XXXIX rule 5 (3) of the CPC. The counsel thus prayed for the dismissal of this application with costs. Having summarized the parties' rival submissions above, it is now time for this court to determine whether the application at hand is meritorious. I have carefully gone through the application, parties' submissions and the cited authorities, and in determination of this application I wish to be guided by the holding of the Court of Appeal of Tanzania in the case of *S. M. SAEED Limited vs Corporate Security Ltd & 2 others*, Civil Application No. 621/17/2021 CAT at Dar es Salaam where the court had the following to say; 5 "It can be deduced from the above provision that an order for stay o f execution can only be made to stay process o f execution o f a decree or order which is subject o f an intended appeal. This means that whoever is aggrieved by the decision o f the court, be it a losing party or even a decree holder can apply for stay o f execution in the event he/she is not satisfied with the decision o f the court. /x From the above principle of the law, it is apparent that for a court to grant stay of execution, there must be a decree of the court capable of being executed. It should be noted that, the applicant herein has filed this application praying for stay of execution

pending an appeal. It is evident from her affidavit that; the intended appeal emanates from the decision of the tribunal which refused to have her application restored after it was dismissed for want of appearance. The applicant went further to state that the 3rd respondent herein had already issued a 14 days' notice intending to sale the mortgaged property. Therefore, from the facts above, it is apparent that the applicant is praying this court to stay execution of an order which was not issued by the tribunal. As the tribunal did not give any order or decree which determined the parties' rights to be enforced over the mortgaged property. It is my firm view that this application is filed prematurely at 6 this stage, and more so, even looking at the order of the tribunal dismissing the applicant's application, it is my finding that the same is unexecutable to warrant this court to grant this application. I have also read the decisions which were cited by the applicant, it is my finding that in those cases, the court granted stay of execution because there was a decree of the court capable of being executed. For instance, in the case of Magreth Thomas Olotu vs Matilda T. Philip (supra) the respondents were brought back to their administration following the recovery of the 429,421 shares and the same were to be distributed to the heirs. In the light of the above, it is the finding of this court that the applicant has wrongly moved this court to issue stay of execution to an order which is unexecutable. For that reason, this application is devoid of merit and it is accordingly dismissed with costs. It is so ordered. DATED and delivered at ARUSHA on this 26th day of July 2024 J. C. TIGANGA JUDGE 1 THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB-REGISTRY AT ARUSHA CRIMINAL APPEAL NO. 129 OF 2023 (Originating from the decision of the Resident Magistrate Court of Arusha at Arusha delivered by Hon. Mbelwa SRM, in Misc. Criminal Application No. 02 of 2023)

ALBERT JACOB VAN AARST..... 1st APPLICANT AQUATECH LIMITED..... 2nd APPLICANT Versus DENNIS BONIFACE BAGUMA.....1st RESPONDENT PAES-WEGS INTERNATIONAL B.V..... .2nd RESPONDENT BREEAAP INVESTMENT B.V..... ..3rd RESPONDENT GIJSBERT DE RAADT..... 4th RESPONDENT BART LUBBEDT..... 5TM RESPONDENT DIRECTOR OF PUBLIC PROSECUTION..... NECESSARY PARTY

JUDGMENT

23rd May 8c 28th June 2024 TIGANGA, J. This is an appeal against the ruling of the trial magistrate (Hon. F. Y. Mbelwa-SRM) in Misc. Criminal Application No. 02 of 2023, in the Court of the Resident Magistrate of Arusha at Arusha. I find it apposite to give a background leading to this appeal albeit, briefly before delving into the grounds of appeal. The appellants namely, ALBERT JACOB VAN AARST, and AQUATECH LIMITED applied to the Court of the Resident Magistrate Page 1 of 16 of Arusha, Miscellaneous Criminal Application No. 02 of 2023 against the respondents namely, DENNIS BONIFACE BAGUMA, PAES-WEGS INTERNATIONAL B.V, BREEAAP INVESTMENT B.V, GIJSBERT DE RAADT, BART LUBBERS, and DIRECTOR OF PUBLIC PROSECUTION (NECESSARY PARTY). In the said application, they sought leave by the court (HON. MBELWA SRM) under section 99(1) and (3) of the Criminal Procedure Act [Cap. 20 R.E. 2022] to privately prosecute the respondents, which was denied by the trial court by sustaining

the point of the preliminary objection raised by the Counsel of the respondents based on section 4 (3) of the Criminal Procedure Act (supra). It is against this backdrop; that the appellants have come to this Court to assail the ruling and order made by the trial court. They filed a petition of appeal containing four (4) grounds as follows;

1. That, the trial Magistrate erred in law and fact by failure to realize that the high court case deals with payments of shares at Kia Lodges Limited, and this Criminal Application deals with illegal transaction/transfer of appellants' shares at Moivaro investment and trading company limited by 1st to 5th respondents.
2. That the trial Magistrate erred in law and fact by failure to find out that the appellants herein have not seek remedies for the Page 2 of 16 following criminal offences conducted by 1st to 5th respondents in the civil case at the High Court
 - i. Forgery contrary to Section 335 (a) and 337 of the Penal Code [Cap. 16 R.E 2022]. Forging of the Board Resolution and share transfer documents, including signatures of the Directors of the 2nd Applicant and the 2nd Applicant's company stamp by 1st, 2nd, 3rd, 4th, and 5th respondents. ii. Obtaining money by false pretence contrary to section 302 of the Penal Code [Cap 16 R.E 2022]. The act of the 2nd, 3rd, 4th, and 5th Respondents receiving USD 159, 960 USD for transfer of shares of KIA Lodge Limited to the 2nd Applicant, with no intention to transfer the said shares. iii. Obtaining registration by false pretence contrary to Section 309 of the Penal Code [Cap. 16 R.E 2022]. The act of the 1st, 2nd, 3rd, 4th and 5th respondent submitting to BRELA transfer forms and board resolutions while no meeting was conducted. iv. Conspiracy to defraud contrary to Section 306 of the Penal Code [Cap. 16 R.E 2022] by the 1st, 2nd, 3rd, 4th, and 5th Respondents. Page 3 of 16
 - v. Offence for failing to comply with tax law contrary to Section 82 (a) and (b) of the Tax Administration Act [Cap. 438 R.E 2019] by 1st, 2nd, 3rd, 4th and 5th Respondent vi. Offence for making or using false or misleading statements or documents contrary to section 84 (3) (b) (ii) of the Tax Administration Act [Cap. 438 R.E 2019]. vii. Offence for making or using false or misleading statements or documents contrary to section 84 (1) (b), 84 (3) (a) (ii) and 84 (3)(b)(ii) of the Tax Administration Act [Cap. 438 R.E 2019].
3. That, the trial Magistrate erred in law and fact despite noting that the matter in civil case and criminal application is likely different and give different decisions, still proceeded to find the objection meritorious and struck out the application.
4. That, the trial Magistrate erred in law and fact by concluding that the stem of the matter in a civil case is the same with criminal case while there was no criminal case yet, but rather an application for leave to file criminal case. When the matter came before me for hearing, the appellants were represented by Mr. Salvasia N. Kimario and Ms. Ikoda Kazzy, learned Page 4 of 16 advocates, on the one side. On the other side, the 1st respondent had the services of Richard V. Massawe whereas the necessary party DPP enjoyed the representation of Mr. Msuya, a learned State Attorney. Submitting in support of the 1st ground of appeal, the appellant's counsel said that the trial magistrate erred in law when he failed to hold that

criminal application emanated from the contract of the sale of Moivaro Investment Trading Company shares to 2nd and 5th respondents, by the applicants. This criminal application deals with Moivaro shares (forgery of documents and illegal transfer of shares), and differs from the civil case at the High Court that deals with KIA Lodge shares (payments were done but transfer was not conducted). It was his further submission that, the applicants are complaining about the illegal transfer of shares which were owned by the appellants at Moivaro lodges by the 1st to 5th respondents, including forgery, obtaining registration by false pretence, conspiracy to defraud, failing to comply with tax laws and making and using false information. He contended that the element has never been pleaded in any civil case, and thus cannot fall under section 4 of the Criminal Procedure Act. In respect of the second ground, Ms. Kimario contended the trial magistrate failed to hold that forgery contrary to sections 335 (a) and 337 Page 5 of 16 of the Penal Code, obtaining money by false pretence contrary to section 302 of the Penal Code, Conspiracy to defraud contrary to section 306 of the Penal Code, Offence for failing to comply with tax law contrary to section 82 (a) and (b) of the Tax Administration Act [Cap. 438 R.E 2019], Offence for making or using false or misleading statements or documents contrary to section 84 (1) (b), 84 (3) (a) (ii) and 84 (3)(b) (ii) of the Tax Administration Act [Cap. 438 R.E 2019]. That the said elements have not been pleaded in any civil case and do not fall under section 4 of the Criminal Procedure Act. He further argued that, the 1st to 5th respondents herein proceeded to transfer appellants' shares which were held at Moivaro Investment Trading Company, without paying the agreed amount of USD 20, 040 and they proceeded to forge a transfer of documents and even board resolution, then submitting the said documents to BRELA to obtain registration by false pretence. Regarding the third ground, he contended that, on page 6 of the judgment, the trial magistrate ruled that the matter in a civil case and the criminal application are two different actions and they will bear two different outcomes, but the magistrate proceeded to strike out the matter only because both elements of civil case and criminal application are coming from the same stem. He contended further that the magistrate Page 6 of 16 failed to know within that contract there were two agreements in which the parties agreed to the sale of shares at Moivaro Investment and Trading Company and the sale of shares at KIA Lodges Limited. In respect of the last ground, he averred that, the trial magistrate erred in law and fact by concluding that the stem of the matter in a civil case is the same as a criminal case while there was no criminal case yet, but rather an application for leave to file a criminal case. In addition to that, he argued further that, it was not correct to hold that a criminal application has the same element as the civil case at High Court since the filed application was just requesting the court for permission to conduct private prosecution. It was the appellant's submission that, the preliminary objection which was heard, went further to determine the merit of the criminal case which was not permitted yet, and section 4 of the CPA could function if the permission to conduct private prosecution was granted. The appellants pray that the ruling be quashed, and set aside, the appeal be allowed and the application for permission of the court to grant institution and conducting private prosecution against the 1st to 5th respondents. Replying to the submission in chief, the counsel for the 1st respondent started by raising a point of preliminary objection, that this

Page 7 of 16 court does not possess the requisite jurisdiction to entertain and determine this matter, for appeal in the circumstances expressly barred by the law in terms of section 359 (1) of the Criminal Procedure Act. Mr. Massawe contended that, the jurisdictional question can be raised at any time, however, he is of the view that the current appeal does not meet the finality test. For there are no rights that have been determined by the trial court. He referred to the case of Robert Kadaso Mageni v R, Criminal Appeal No. 476 of 2023, CAT, on page 6 when interpreting about interlocutory order. He argued further that there are no criminal charges that entitle the appellants to appeal. He averred that the trial court's decision only ruled on the timing of the action. The order to struck out an application for it to be filed at an appropriate time, he in the end asked for the appeal to be dismissed. In the alternative, Mr. Massawe submitted on the first ground appeal that, the records are clear that there is only one agreement in question before the High Court. That agreement might be ruled not in existence, invalid, or unenforceable. He contended that what is termed as one contract two agreements is one contract with two transactions or two terms. For that reason, the law requires the conclusion of one remedy Page 8 of 16 before invoking the other. The appellants claim that, the respondents' acts or omission attract both civil and criminal liability, and it is exactly what is dealt with by section 4 (3) of CPA. He contended that, the appellants admit on page 2 of the submission "both didn't go as planned and thus created two courses (sic) of action". It was his submission that the appellants plead and submit the existence of a contract. He argued further that they feel the respondents' acts and omission occasioned a breach of contract that attracts civil claim and criminal offence that attracts criminal liability. He further illustrates that, our criminal system does not recognize criminal liability as a cause of action, the wording by the appellants is used purposely to mislead, in civil law two causes of action can be joined or attract two different suits. He contended that, when a matter attracts both civil, criminal, and administrative remedies, the civil ones should be invoked first, even if the appellants have not invoked those proceedings they are bound to exhaust first. Submitting on the second ground, Mr. Massawe contended that the validity of the agreement and payment of the said amount is yet to be determined by the High Court. He narrated that the law bars this kind of scenarios for its necessary confusion that might happen. The argument Page 9 of 16 that certain elements have not been pleaded in the civil suit is immaterial. He argued further that the law is to the effect that complaints touch both criminal, civil, and administrative, one remedy follows the other as against the parallel existence of the two. In addressing the third ground, it was his submission that, the appellants admit there is only one Contract signed between the parties, but with two agreements. The line of argument aims at maneuvering the legal requirement for the appellant to know for a fact, that one contract is the subject of a civil suit and so wants to create two of them. In his submission, the last ground attempts to differentiate criminal cases and applications instituted before the trial court. He contended that the wording used is an invocation of criminal process under the Act, section 4 (3), and the Application is under the Criminal Procedure Act. The learned counsel for the appellant spoke about affidavits. Mr. Massawe averred that there is no holding of the trial court that touched the substance of the criminal offence. He prayed for the dismissal of the appeal.

Rejoining, the counsel for the appellant opined that, it was not correct for the respondent's counsel to raise the point of preliminary objection at this time of written submission, an action which is Page 10 of 16 inappropriate and against the law. He referred to the case of Registered Trustees of the Baptist Convention of Tanzania @ Jumuiya Kuu ya Wabatisti v James Kasomi and others, Misc. Civil Application No. 35 of 2021 HC- Mwanza. The appellants' counsel averred that section 359 (1) of the CPA, provides for a right to appeal by any person aggrieved by a finding, sentence, or order passed by a subordinate court. He contended that, the order given by the trial court has the effect of finally determining the criminal charge, which falls within the ambit of the exception. The rest have been reiterated from what was submitted in the appellant's written submission. Upon canvassing the grounds of appeal along with the submissions by the counsels, the pivotal issue for determination of this appeal is one to wit; whether the trial magistrate erred in law and fact by not finding merit to proceed with the application pending the determination of the civil suit before the High Court. I will start by addressing the point of the preliminary objection raised by the respondent's counsel during the reply to the submission in chief. He contended that this Honourable Court lacked the requisite jurisdiction Page 11 of 16 to entertain and determine this matter in appeal as it is expressly barred by the law in terms of section 359 (1) of the CPA. I find the necessity to reproduce the provisions of section 359 (1) of the CPA as follows: "359 (1). Save as hereinafter provided, any person aggrieved by any finding, sentence, or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act may appeal to the High Court and the subordinate court shall at the time when such finding, sentence or order is made or passed, inform that person of the period of time within which, if he wishes to appeal, he is required to give notice of his intention to appeal and to lodge his petition of appeal"

- (2) Any appeal to the High Court may be on a matter of fact as well as on a matter of law.
- (3) Notwithstanding the provisions of subsections (1) and (2), no appeal shall be made in respect of any preliminary or interlocutory decision or order of a subordinate court unless such decision or order has the effect of finally determining the criminal charge. "[Emphasis added] It is to be noted from the above provisions that while the combined effect of subsections (1) and (2) is to create a right of appeal to the High Page 12 of 16 Court against any finding, sentence, or order made by a subordinate court as a trial court upon any matter of fact or law, subsection (3) bars any appeal against a preliminary or interlocutory decision or order having no effect of finally determining the criminal charge The Court defined the phrase "interlocutory order" in Seif Sharif Hamad v. S.M.Z. [1992] T.L.R. 43 at p. 46 by quoting from Black's Law Dictionary, Revised 4th Edition, to mean "An order which decides not the cause, but settles some intervening matter relating to it ." See also, for example, Murtaza Ally Mangungu v. The Returning Officer of Kilwa & 2 Others, Civil Application No. 80 of 2016 (unreported); Juma Robi v. Republic, Criminal Appeal No. 128 of 2020 [2022] TZCA458 [18 July 2022; TanzLII]; and Tanzania Posts Corporation v. Jeremiah Mwandia, Civil Appeal No. 474 of 2020 [2021] TZCA 311 [16 July 2021; TanzLII]. Following the Court's

reasoning in Seif Sharif Hamad (supra), I hold, as I must, that the cause before the trial court is whether the appellant is entitled to a leave to conduct private prosecution against the respondents. An interlocutory order typically refers to a decision made by a court during the course of litigation that does not finally determine the rights of the parties involved. However, in this case, the denial of a grant for leave to Page 13 of 16 institute private prosecution is a final decision that effectively ends the criminal application. As such, it is not appropriate to classify this decision as an interlocutory order. In conclusion, the preliminary objection raised by the opposing party is without merit. The denial of a grant for leave is a final decision that should be treated as such. Upon canvassing the grounds of appeal along with the submissions by the counsels, the pivotal issue for determination of this appeal is one to wit; whether the trial magistrate erred in law and fact by not finding merit to proceed with the application pending the determination of the civil suit before the High Court. After going through all the grounds of appeal, I have realized they are related, since I will be addressing all the grounds in one take. The main question is whether the decision of the trial court is justifiable and meritorious. As I hinted earlier, the appellant instituted his purported petition of appeal to the High Court after he had been aggrieved by the decision of the trial court. It is on record that at the hearing of the said application, the counsels of both parties had two assertions. It was the contention of the respondent counsel that, there is only one contract. This was resisted by the appellant counsel, who averred there are two agreements in one Page 14 of 16 contract. He contended that the civil suit covered and instituted before the High Court was not pleaded in the application seeking leave to institute private prosecution. It panned out that the court concluded that since no one is sure what scope will be taken in the pending civil suit before the High Court, and since the criminal case does not die and is subjected to the law of limitation. He did not think it was right to proceed with the application before the High Court determines the all-civil remedies available to the respondent. It is my considered view that, the decision of the trial court was correct, accurate, and justifiable. I am saying so by being guided by the provision of section 4 (3) of the CPA, as reproduced hereunder; "4 (3) Notwithstanding subsection (2), where a matter is of a civil, administrative or criminal nature, as the case may be, exhaustion of the remedies in civil or administrative domains shall be mandatory prior to the invocation of the criminal process in accordance with the Act" From the above provision of the law, it is immaterial as to whether there are two agreements, one contract or the other way round. What is important is that, the civil remedies have to be exhausted first prior to invocation of the criminal process. As correctly observed by the trial court, Page 15 of 16 the dictates of the law require the Civil court to adjudicate on the matter as to the validity and legality of the said contract first. The parties should pursue the civil remedy first before taking the criminal path. Nonetheless, in the appropriate situation, even where an allegation of criminal charges arising out of a different contract (which is not the case in the instant appeal), the court should decline the application if the applicant did not exhaust the civil remedies. Simply put, the principle of exhaustion of civil remedies is mandatory. The intended application for leave to conduct private prosecution sought is expressly barred by the law as explained above. The appeal is without merit and hence dismissed in its

entirety. It is accordingly ordered. DATED and delivered at ARUSHA on this 28th day of June 2024. J. C. TIGANGA JUDGE COURT: Right of Appeal is explained. Page 16 of 16

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/316317/source_file/4a7f254980f5e198/ALBERT_JACOB.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/albert-jacob-van-aarst-v-dennis-boniface-baguma-privateprosecution-tanzlii-2024--6a3ea5243b1caa9129819926>

Prepared on 12 October 2026 · Esheria