

TANZANIA / JUDGMENT

20151026 TZCA Dar es Salaam

COURT
TZCADECIDED
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-J IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: LUANDA, J.A.,
MUSSA, J.A. And MUGASHA, J.A. CIVIL APPLICATION NO. 156 OF 2014 DOMINA
KAGARUKI APPLICANT VERSUS

1. FARIDA F. MBARAK
 2. FARID AHMED MBARAK
 3. TANZANIA BUILDING AGENCY RESPONDENTS
 4. ELIUS A. MWAKALINGA
 5. THE COMMISSIONER FOR LANDS
 6. THE HONOURABLE ATTORNEY GENERAL (Application for stay of execution and restrain order from the decision, decree and judgment of the High Court of Tanzania at Dar es Salaam ..) (Mgeta, J.) dated the 30th day of June, 2015
- in Land Case No. 51 of 2004 RULING OF THE COURT 5th & 29 th October, 2015 LUANDA, J.A.:
By notice of motion made under Rules 4 (2)(a) and 11(2) (b) (c) (d)
- (i) and (ii) of the Court of Appeal Rules, 2009 (the Rules), the above named applicant is moving the Court for the following orders:- 1
- (1) That the first, second and fourth respondents be restrained from carrying out any construction, transferring and / or changing ownership of the property registered under certificate of title Number 186030/6 and 186030/5 in which House No.2 which was partly constructed to Plots No. 105 and 106 occupied by the applicant was demolished by the second respondent with a view to developing the same.
 - (2) That execution of part of the Judgment and Decree of His Lordship Mgetta, J. sitting at the High Court of Tanzania, Land Division at Dar Es Salaam in Land Case No.SJ of 2004 delivered on the 3dh day of June, 2015 as to payment of monetary award be stayed pending the final determination of an Intended appeal to the Court. Submitting in support of the application, Mr. Eustace Rwebangira learned Counsel for the applicant first said the decree had already been executed. However, their application is for a restraining order so that the parties maintain the status quo pending the hearing of the appeal. As for order of stay, he said they

are making that application so that the amount his client 2 was ordered to pay should be stayed pending the outcome of the hearing of the appeal. The reason for the application was that his client would suffer irreparable loss. The applicant undertakes to furnish security for costs. In reply Mr. Protace Zake learned advocate for the 1st and 2nd respondents resisted the application. He said the conditions stated do not satisfy the law in particular, so long as execution had already taken place, there is nothing to stay. The application had no merits and the same should be dismissed with costs. On the other hand Mr. Hangi Chana learned State Attorney who represented the 3rd, 5th and 6th respondents did not oppose the application because they did not file an affidavit in reply! Briefly the background of the application is to this effect. Initially the applicant had filed a suit in the High Court (Land Division) against the 1st and 2nd respondents where judgment was entered in her favour. The respondents were aggrieved, they appealed to the Court. The Court set aside the entire proceedings and ordered the 3rd respondent who was a 3 necessary party be joined. The Court also ordered that the case was to start afresh. The dispute involves the question of ownership of a house. The applicant also raised a counter claim in connection with the suit property. The case started afresh not only by joining the 3rd respondent, but the 4th 6th respondents were also added as the defendants. The suit went on full trial. At the end of the trial, the 1st and 2nd respondents were declared lawful owners of the suit land and were also awarded other ancillary orders, including general damages to the tune of Tsh. 100,000,000/= which the applicant was condemned to pay. The applicant is aggrieved, she has filed a notice of appeal with a view to challenging that decision in this Court, hence this application. Having carefully read the application along with the written submission, we were wondering in the first place whether the Court can simultaneously and competently issue the two orders sought. We are saying so because our understanding of restraining orders are that they are intended to maintain the status quo ante of the parties in a trial of a suit pending its outcome which is commonly referred to in the High Court and 4 subordinate courts save primary courts, as a temporary injunction which is governed by O.XXXVII, Rule 1 (a)(b) of the Civil Procedure Code, Cap. 33, RE 2002 (the CPC). The CPC does not apply in primary courts. (See S.3 of the CPC). Even in Primary Court there is Rule 17(1) of the Primary Courts Civil Procedure Rules, 1964 (GN. 310 of 1964) which is akin to the order referred above. O.XXXVII, R.I (a) (b) of the CPC provides:-

1. Where in any suit it is proved by affidavit or otherwise -
 - (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or suffer loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree, or
 - (b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders. [Emphasis Ours] On the other hand stay

of execution is geared towards suspending operation of judgment already entered pending the hearing of an appeal. It is clear that the two applications are quite distinct and they serve different purposes. Further, the application to restrain as shown above is not the domain of this Court. This Court has no powers to issue restraining orders to a matter which comes by way of an appeal. So, the application to restrain the 1st, 2nd and 4th respondents in connection with the first application is misconceived. The cases cited by Mr. Rutabingwa in support of this ground namely Selcom Ganing Ltd V Ganing Management (T) Ltd Civil Application, No. 175 of 2005 (CAT) (unreported); Sudhir P. Lakhanpal V The loans and Advance Realization Trust & Another, Civil Application No. 76 of 2002 (CAT) (unreported) and Sudhir F. Lakhanpal V The Loans and Advances Realization Trust (LART), Civil Application No. 65 of 2006 CAT (unreported) were referred out of context. All were referring to an application for stay of execution and not for restraining orders. 6. Next we move to the application for stay. Mr. Rutabingwa told the Court that the execution has already taken place. One of the essential feature of an application for stay of execution is that the decree/order intended to be stayed should not have been executed. Once it is shown that execution has already taken place then obviously the application for stay of execution has no room to be entertained; there is nothing to stay. But having read the record properly the execution we were referred to was in respect of the demolishing of the house. It means the payment of Tsh. 100,000,000/= is yet to be carried out. With regard to this ground, the applicant did not say how she was going to suffer irreparable loss. A bare assertion is not enough. The applicant ought to have shown how she would suffer that loss if execution is not stayed. We decline to issue an order of stay. The application is dismissed with costs to the 1st and 2nd respondents. It is so ordered 7. I L., DATED at DAR-ES-SALAAM this 26th day of October, 2015. B. M. LUANDA JUSTICE OF APPEAL K.M. MUSSA JUSTICE OF APPEAL S.E.A. MUGASHA JUSTICE OF APPEAL I certify that this is a true copy of the original. 8.

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